Supreme Court, U.S.
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No. 02 772

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS G. VOLLMER, PEGGY R. POSPESHIL, MARRY KENNAH, Individually, and On behalf of all others similarly situated, et al.,

Plaintiff,

Francis D. Palumbo

Petitioner,

v.

Publishers Clearing House and Campus Subscriptions, Incorporated

Respondent,

On Petition for Writ of Certiorari
To the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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101 pp

(a). The following are the question presented for review.

1. Did the United States District Court on December 20, 1999 have the jurisdiction to deny the Petitioner's motion to intervene during the time that a motion to intervene was under appeal by the United States Court of Appeals for the 7th Circuit, by putative interveners Frederick L. Hawk, Michael Hoy, and Timothy Watkins?

2. Was the district court's order denying the motion to intervene interlocutory, and as class members do you have the right to appeal from a final order entered in the district court?

(b). A list of all parties to the proceeding in the court whose judgment is sought to be reviewed.

Thomas G. VOLLMER, Peggy R. Pospeshil, Mary Kennah, Phillip Ingram, Albert E. Dix, Steve Mallia, Michelle Collins, Barbara Buchanan, H. Duane Kundert, and Dr. Robert Rosenthal, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

Francis D. Palumbo, Petitioner,

v.

Publishers Clearing House, and
Campus Subscriptions Incorporated,

Respondent,

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(d). Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

The opinion of the United States Court of Appeals for the 7th Circuit, was decided on April 27, 2001, is reported at *Vollmer V. Publishers Clearing House and Campus Subscriptions,* 248 F.3d 698, the opinion is not in the Petitioner's appendix for Petition for Certiorari. Appellate Nos. 99-3993, 00-1562, and 00-1610

The opinion of the United States District Court For the Southern District of Illinois, was decided on October 6, 1999, is reported in the Federal Rules of Decision, *Vollmer v. Publishers Clearing House and Campus Subscriptions*, 194 FRD 637. The opinion can be found in the Petitioner's appendix for Petition for Certiorari.

The Memorandum and Order of the United States District Court for the Southern District of Illinois, was filed on December 8, 1999, Civil Case No. 99-434-GPM, G. Patrick Murphy, Chief District Judge. This order can be found in the Petitioner's appendix for Petition for Certiorari.(Doc. #145)

(e) **Jurisdiction**. A concise statement of the basis for jurisdiction in this Court: This is not Certiorari to a United States Court of Appeals before judgment as required in Rule 11 of the Rules of the Supreme Court of the United States. This is a Certiorari to the United States District Court for the Southern District of Illinois. Jurisdiction Rests upon Federal Rule of Civil Procedure Rule 24, Federal Rule of Civil Procedure Rule 41, 28 U.S.C.A. *Zaklama v. Mount Siani Medical Center,* 906 F2d 645, *Kusay v.U.SA*, 63 F3d 192, 124 F3d 206, *Greggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58. The time factor upon which jurisdiction rests is determined upon the appeal of the final Judgment of the entire case.

(i) "Order" Denying motion to intervene on December 20, 1999.In The United States District Court For the Southern District of Illinois. Case # 99-434-GPM Petitioner

"Order" Hawk waived his appellate rights on May 24, 2001, Appellant Arguments on Motion to Enforce Settlement on May 24, 2001. In the United States District Court For the Southern District of Illinois Consolidated, Case #'s 99-3993, 00-1529, 001562 11-1610. F.L Hawk Proposed Intervener-Appellant

"Memorandum and Order" Court denied motion to Intervene as moot, on July 30, 2001. In the United States District Court for the Southern District of Illinois. Case # 99-434-GPM, Petitioner-Francis D. Palumbo-Proposed Intervener.

"Memorandum and Order" Court denied motion for Reconsideration, on August 30, 2001. In the United States District Court for the Southern District of Illinois. Case # 99-434-GPM, Petitioner, Francis D. Palumbo-Proposed Intervener-
"Order" Dismissing the Appeal for lack of jurisdiction

January 25, 2002. United States Court of Appeals for the Seventh Circuit. Case # 01-3573, Petitioner. Francis D. Palumbo-Appellant

"Order" Final Judgment filed 4/27/01 [99-3993. 00-1562, 00-1610] Frederick L. Hawk. Proposed Intervener-Appellant.

Appellate Court"Filed Mandate Receipt", June 14, 2001, [00-1562, 00-1610, 99-3993, Frederick L. Hawk.

(ii) "Order" Denying motion for reconsideration of final order. June 10, 2002. United States Court of Appeals for

The Seventh Circuit. No request for extension of time to file the Petition for Writ of Certiorari. Case #-01-3573 Petitioner. Francis D. Palumbo-Appellant

Appellate Court "Filed Mandate Receipt" [01-3573] June 17,2002, Francis D. Palumbo-Appellant.

(iii) No reliance on Rule 12.5

(iv) Federal Rule of Civil Procedure 24, 28 U.S.C.A

(f) The Federal Rules of Civil Procedures are the governing bodies to intervene as of right. The question of Constitutional provisions, treaties, statutes are not applicable in these proceedings, but are governed by non statutory intervention Rule 24(a) (2). The intervention of right based upon movant's interest in the subject matter. *United States v. Texas E .Transmission Corp,* 923 F2d 410, 414. The applicant for intervention of right must establish a sufficient legally protectable interest in the property or transaction. *United States v. Hooker Chemical*, 749 F2d 968, 983. The applicant must show direct, practical impairment of interest if intervention is not granted. The applicant must show inadequate representation by the existing parties. *Trbovich v. United Mine*

Workers of America, 404 U. S. 528, 538. The applicant for intervention as of right must be timely. *NAACP V. New York,* 413 U. S. 345, 366.

CONCISE STATEMENT OF THE CASE

(g) On February 3, 1998 Thomas G. Vollmer filed this class action lawsuit against Publishers Clearing House, and American Family Publishers, in the Illinois State Court. The Illinois State court later severed Thomas G. Vollmer's claims against AFP from his claims against PCH. Publishers Clearing House sells magazine subscriptions and other merchandise through direct mail advertising. PCH has also operated Publishers Clearing House Sweepstakes. The complaint charged that PCH fraudulently induced customers to purchase magazines. PCH falsely suggested in its advertising that customers could increase their chances of winning the Sweepstakes by making purchases of the magazines. The complaint was amended to include allege violations of federal racketeering laws, which led to the removal of the case to the district court pursuant to the federal question jurisdiction. The petitioner had been told by Publishers Clearing House that he had won the $10,000,000.00 prize, and he should immediately purchase the magazine so that he could collect the Sweepstakes. August 3, 1999 the petitioner received notification of the class action law suit. September 9, 1999, Frederick L. Hawk filed a petition to intervene for "limited purposes of viewing document depository". The petitioner submitted an Entry of Appearance October 2, 1999, also a motion for leave to amend complaint on October 2, 1999; the District Court denied the motion for leave to amend complaint. The District Court on October 4, 1999, scheduled a hearing; and on the day of the hearing on Frederick L. Hawk's petition to intervene for limited purposes; the court was alerted to Mr. Hawk filing a more general motion to intervene. The District Court on that morning October 4, 1999 denied Frederick L. Hawk's motion(s) to intervene, Date of Judgment October 21, 1999, the District Court also imposed Rule 11 Sanctions on Hawk's attorneys, Mr. Selden

and Mr. Rosenthal and Frederick L. Hawk filed an appeal to the United States Court of Appeal for the Seventh Circuit, Docket No. 99-3993, November 1, 1999. All three appeals were consolidated, 99-3993, The petitioner filed a motion to object to Order of the District Court on November 13, 1999, denying the motion for leave to amend the complaint. On November 1, 1999, the United States District Court issued a Status Conference, construing that the petitioner in his motion for leave to amend complaint as a request to "opt out" the court **GRANTED** as to the petitioner. The Petitioner on November 21, 1999 issued a motion to intervene as plaintiff. On November 30, 1999 the petitioner issued a Motion for leave to intervene to amend complaint in accordance with Rule 24(a)(2) and 24(b)(1). Demand for Judgment for $600,000.00. On November 29, 1999 the petitioner filed motion to object to Status Conference, stating that the court misconstrued the petitioner's intent, and does not want to "opt out". On November 9, 1999 United States District Court issued an Order regarding procedures for final fairness hearing. On December 7, 1999 the petitioner filed an objection to the settlement. On December 8, 1999, the United States District Court issued [Doc. #145] Memorandum and Order. Ordering the petitioner to appear on Monday, December 20, 1999 at 3:00 p.m. and testify under oath, and the court ordered the clerk to mark out the file stamp on the petitioner's motion for leave to intervene to amend complaint. On December 22, 1999, the petitioner filed an objection to the United States District Court's Memorandum and Order (Doc. #145]. The petitioner was not properly notified of the scheduled hearing date of December 20, 1999. The petitioner filed a motion to request multiple hearings. December 23, 1999 the petitioner filed a document "for leave to intervene to amend complaint". January 22, 2000 the petitioner filed a request for permission to give testimony at Final Fairness Hearing on January 25, 2000. The petitioner appeared at the Final Fairness Hearing at the United States District Court House on January 25, 2000. On January 19, 2000 the court issued Memorandum and Order denying the petitioner's second request

for motion for leave to intervene to amend complaint. The District Court also overruled the objection filed by the petitioner on the Courts Memorandum and Order on December 8, 1999, and finally denied the petitioner's requests for multiple hearings on his motion to intervene to be held at the "District Court in New York City" The District Court filed on February 18, 2000, "Judgment in a Civil Case" on the Second Amended Class Action filed by the plaintiffs, it is ordered and adjudged that pursuant to the Court's Memorandum and Order filed February 18, 2000, this action is hereby dismissed with prejudice. Also filed on February 18, 2000 Memorandum and Order on the Final Approval of the proposed settlement; Findings of Fact and Conclusions of the law. Also filed on February 18, 2000, Memorandum and Order of the Court on the motions filed by the Oklahoma Senior Citizens and Mildred Fowler, motions to opt out is denied. And "Motion for Order" filed by the petitioner on February 11, 2000, is denied. On February 27, 2000 the petitioner filed an objection to the Memorandum and Order of the court filed February 18, 2000. The petitioner states that he spoke to Mr. Spronge and Mrs. Gates on December 13, 1999, and had never been told of the scheduled hearing set down for December 20, 1999, (copy of the telephone bill filed with appendix), and under adequacy of Representation Fed R. of Civ P. Rule 23(a)(4) that the interests of absent class members be fairly and adequately protected. On December 21 spoke to Steven Katz, Class Counsel, who had said; they were not obligated to notify the intervener that he was required to attend the hearing. The petitioner submitted an affidavit of his proposed testimony. On February 24, 2000 Frederick Hawk filed a Notice of Appeal of the Order of February 18, 2000 of the District Court. On March 1, 2000 respondents and Selden filed a notice of appeal on the final order requiring them to pay $50,000.00 for the Rule 11 sanctions. Frederick L. Hawk filed a Supplementary Notice of Appeal on March 6, 2000. The District Court issued Order for the Selden and Rosenthal to deposit $51,000 to satisfy judgment of the court. March 17, 2000. On March 31, 2000, the United States District Court issued an "Order" The District Court stated that on November 1, 1999 a notice of appeal was filed. The District Court cites Kusay v. United States 62 F.3d 192 ("Just as the notice of

appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court, Until the mandate issues, the case is in the court of appeals, and any action by the district court is a nullity." The District Court filed Order on March 31, 2000 overruling the petitioner's objection pending the issuance of the mandate of the court of appeals. On April 4, 2000. the District Court issues an Amended order denying motion No. 240. District Court issues an amended Order on the objection filed by objector Francis Palumbo, overruling the objection pending issuance of mandate of the court of Appeals. May 29, 2001 has received an application for a temporary restraining order and writ of mandamus ordering the two defendants to discontinue the legal efforts in the United States District Court for the Western District of Kentucky. On May 24, 2001, court finds that Frederick Hawk has effectively waived his appellate rights, making the judgment in this action final. May 29, 2001Enterprise Bank & Trust is ordered to disburse $3,000,000.00 to Carr, Korein for their fees. Publishers Clearing House was ordered to present the court with a surety bond in the amount of $22.5 million. On June 13, 2001 upon motion of Publishers Clearing House, release to the Wisconsin Attorney General the names of each claimant, and the amount of each claim. June 15, 2001, District Court received response from Noble F. Pepper; proceedings were dismissed in the Western District of Kentucky. Order of the court on motion of Publishers Clearing House with consent of class counsel release to state Attorneys General Petitioner forwards letter July 15, 2001 to United States District Court stating that motion to intervene is not finalized. July 30, 2001, District Court issues Memorandum and Order, finalizing the motion to intervene, it was ordered denied. August 11, 2001 the Petitioner files a motion for reconsideration. On August 21, 2001, Class Counsel files opposition to Motion for Reconsideration. August 30, 2001 the District Court denies motion for Reconsideration. The Petitioner files an appeal on September 25, 2000, paid the filing fee of $105.00. Petitioner files on October 1, 2001, a Docketing Statement. On October 2, 2001, United

States District Court issues a Notice of Docketing Appeal, for filing brief on November 13, 2001, the petitioner received the Notice of Docketing Appeal on November 21, 2001, nearly 59 days late. On October 5, 2001, the United States Court of Appeals for the 7th Circuit issues Order for petitioner to file a brief memorandum stating why this memorandum should not be dismissed for lack of jurisdiction, and suspends the briefing pending further court order. Petitioner on October 9, filed an Transcript Information Sheet. Petitioner filed on October 19, 2001 a Jurisdictional Memorandum. United States Court of Appeals for the 7th Circuit Orders Publishers to file a response to petitioner's jurisdictional memorandum. On November 1, 2001 Publishers Clearing House files response to Court Order. United States Court of Appeals for the 7th Circuit files Order on January 25, 2002, Dismissing the appeal. Petitioner files a motion for reconsideration and appendix. On June 10, 2002 United States Court of Appeals for the 7th Circuit denies motion for reconsideration of final order. Mandate Issued June 12, 2002.

(h) Consideration Governing Review on Certiorari

United States District Court has decided an important federal question in a way that conflicts with decisions of other United States District Courts; but should be settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

(a) Concise Argument for Granting the Writ

This argument is founded upon the "Sur Petition for Rehearing" EN BANC a full rehearing before a full house of the United States Court of Appeals for the Third Circuit. The Third Circuit ruled that the order issued by the district court to deny the motion to intervene was interlocutory, and cannot be appealed until a final order is issuedbecause the objecting class members will be able to appeal from any final order entered in the district court. *M. Carlough v. Amchem Products Inc. v. Admiral Insurance Company,* 5 F.3d 707, No. 93-1429 (Third Circ. 1993). The

United States District Court For the Southern District Of Illinois, Vollmer v. Publisher Clearing House and Campus Subscriptions, No. 99-434 GPM denied the petitioners motion to intervene December 20, 1999, Prior to the Final Fairness Hearing, that was before the court on January 25, 2000. "On May 24, 2001, court finds that Frederick Hawk has effectively waved his appellate rights, making the judgment in this action final." Therefore the *"ORDER"* issued by the District Court finalized the proceedings, giving class members, who chose to intervene the right to intervene. In *Accord, Pettway v. American Cast Iron Pipe Co.* 576 F2d 1157 1180 (5th Cir. 1978). "The disposition of their motion by the district court is therefore irrelevant on this appeal." *Apostol v. Galion,* 870 F2d 1335, 1337 (7th Cir. 1989); *Henry v. Farmer City State Bank,* 808 F2d 1228, 1240 (7th Cir. 1986) Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court. Until the mandate issues, the case is "in" the court of appeals, and any action by the district court is a nullity.

On December 8, 1999 the court ordered the clerk of the court to remove the petitioner's "Motion for Leave to Intervene to Amend Complain," a proposed document. This document has not been ruled upon by this court which is irrelevant, and remains inactive in the Court's file. The petitioner filed a motion for order on January 7, 2000, their being no objection the petitioner "motion to intervene as plaintiff, and motion to intervene to amend complaint be granted.

"Thus, member of a class who were entitled to appeal from the final approval or disapproval of any settlement agreement in an asbestos class action were not entitled immediately to appeal denial of their motion to intervene. *Moore's Federal Practice Rule 24 of the Federal Rule of Civil Procedure Section 24.24[1]. [age 24/92*

(b) Summary Argument for Granting of Writ

The petitioner filed his motion to intervene as a member of the settlement class in a class action law suit during the time that the proceedings were under appeal. This is irrelevant as to the appeal. *Accord, Pettaway v. American Cast Iron Pipe Co.* 576 F2d 1157, 1180 (5th Cir. 1987) "This disposition of their motion by the district court is irrelevant on this appeal." The petitioner in this action waited for final order or final judgment of the class action settlement, to appeal the motion to intervene. The district court issued a Memorandum and Order filed July 30, 2001. The district court stated as follows: "The motion to intervene is "finalized." It was denied over a year ago. Therefore, Francis Palumbo's request for this Court to rule on his motion to intervene is **DENIED AS MOOT.** The petitioner then filed a motion for reconsideration on August 13, 2001 and subsequently filed an appeal on September 21, 2001, after the district court denied the motion for reconsideration on August 30, 2001.

The motion to intervene was timely, one of the four prongs for intervention as of right and the appeal was filed after the settlement of the class action law suit. And did not interfere with the proceedings at the District Court. Frederick L. Hawk's appeal delayed the final settlement, also delayed the petitioner from filing an appeal of the final order of the District Court.

No.

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(i) the opinions, orders, findings of fact, and conclusions of law.

The following opinion was taken from; In the United States Court of Appeals for the Seventh Circuit, No. 93-3973, *Kusay v. United States of America.* Appeal from the United States District Court of Illinois, Eastern Division. No. 93 C 1563—James H. Alesia, Judge.

Before CUMMINGS, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Last May 3 the court issued an order, which we reproduce as an appendix, remanding for an evidentiary hearing to determine whether Walter Kusay's lawyer had refused his direction to appeal from his conviction for mail fraud. The mandate was to issue on June 26. Apparently impatient with his delay , a result of the extra time to seek rehearing when the United States is a party to civil litigation, see Fed. R. App.Pl 40(a), 41(a), which a petition under 28 U.S.C. section 2255 initiates, the district court acted without waiting for the mandate. The court appointed counsel for Kusay and on May 18 held an evidentiary hearing. On June 5 the judge released a short opinion and entered an order denying Kusay's petition for collateral relief. The judge credited the lawyer's account of matters and disbelieved Kusay's. The district court sent the opinion and order to us as a "supplement to the record on appeal," and we deferred issuance of the mandate so that we could decide what significance this "supplement" possesses. We asked the parties for memoranda, alerting them to the possibility that the district judge lacked jurisdiction.

[1,2] Kusay's appointed lawyer responded that, because Kusay has been released from prison, he is no longer "in custody" for purposes of section 2255. This is incorrect. Kusay is serving a term of supervised release, a form of custody that my be

abbreviated if he prevails in this action. The cause therefore is not moot. *United States v. Chavez-Palacios,* 30 F.3d 1290, 1293, (10th Cir 1994). Cf. *Garlotte v. Fordice,* ___ U.S, ___, 115 S.Ct. 1948, 132 L.Ed.2d 36 (1995). For his part, the prosecutor suggested that we could finesse the subject by issuing our mandate *nunc pro tunc* as of May 17, retroactively bestowing jurisdiction on the district court. This suggestion betrays lack of understanding not only of the office of *nunc pro tunc* orders but also of this court's recent cases, which have disparaged efforts to use such orders to rewrite history. "This phase__ literally 'now for then' __ refers do situations in which the court's records do not accurately reflect its actions. When the error comes to light, the court corrects the file to show what actually happened." *In re Singson,* 43 F.3d 316, 318 (7th Cir. 1994). The power to correct erroneous records does not imply ability to revise the substance of what transpired or to backdate events. See *In re Jarvis,* 53 F.3d 416, 418-19 n.2 (1st Cir. 1995); *Ionization International, Inc.* 825 F.2d 1180, 1188 (7th Cir.1987); *United States v. Taylor*, 841 F.2d 1300, 1305, (7th Cir 1988). Cf. *United States v. Caswell,* 36 F.3d 29, 31 (7th Circ.1994). The United States does not ask us to correct records to show what happened; it wants us to change history. Incantation of Latin phrases does not bestow such an Orwellian power. We must decide whether the district judge had jurisdiction given the state of affair when it acted.

[3] "[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58, 103 S. Ct. 400, 401-02, 74 L.Ed.2d 225 (1982). See also *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 379, 105 S.Ct. 1327, 1331 84L.Ed2d 274 (1985); *Hovey v. MacDonald,* 109 U.S. 150, 157, 3 S.Ct. 136, 139-40, 27 LEd. 888 (1883); *Apostol v. Gallion,* 870 F.2d 1335, 1337

(7th Cir. 1989); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir.1986). Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court. Until the mandate issues, the case is "in" the court of appeals, and any action by the district court is a nullity. *United States v. Wells*, 766 F.2d 12, 19, (1st Cir 1985); *Zaklama v. Mt. Sinai Medical Center*, 906 F.2d 645 649 (11th Cir.1990); 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, *Federal Practice and Procedure* section 3949 at 359 (1977).

[4-8] *Griggs* notes an important limitation on the rule that just one court at a time possesses jurisdiction: the doctrine applies only to "those aspects of the case involved in the appeal." A district court therefore may award attorneys' feed while the merits are on appeal, *Terket v. Lund*, 623 F.2d 29, 33-34 (7th Cir.1980), and may consider whether to grant permanent injunctive relief while an appeal from a preliminary injunction is pending, *Chrysler Motors Corporation v. International Workers Union*, 909 F.2d 248, 250 (7th Circ.1990). A district court may address ancillary questions such as costs, the registration of judgments, and motions for certificate of probable cause. *Chicago Truck Drivers Pension Fund v. Central Transport, Inc.*, 935 F.2d 114, 119-20 (7th Cir.1991); *Wilson v. O'Leary*, 895 F.2d 378, 382 (7th Cir.1990). And when a notice of appeal from an interlocutory order is a frivolous effort to block the normal progress of litigation, the district judge may so certify and continue with the case. *McMath v. Gary*, 976 F.2d 1026 (7th Cir.1992); *Apostol* 870 F.2d at 1338-39. The hearing the district court conducted cannot be described as an ancillary or unrelated matter – it was the nub of the case, the very thing we directed the court to do on remand, but done before the remand occurred.

Citing *United States v. Stafford*, 29 F.3d 181 (5th Cir.1994), the prosecutor asks us to cast aside technicalities such as the allocation of jurisdiction among tribunals. We do not think the mandate's

role in transferring jurisdiction some arcane precept that has out live its usefulness; jurisdiction is power to act, and it is essential to have clear rules that define who, if anyone, possesses this power, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988); *Helm v. RTC*, 18 F.3d 446 (7th Cir.1994). We grant that *Stafford* offers the prosecutor the strong support. The court of appeals remanded for resentencing, a step the district court accomplished before the mandate issued. The court of appeals disapproved this action but held that the district court had not exceeded its jurisdiction. It gave two reasons, one practical and the second precedential. The practical reason was that the delay in issuance of mandate is designed to permit the court of appeals to reconsider its decision; because the court had not revised its judgment in the case at hand, it saw no obstacle to parallel adjudication in the district court. The precedential reason was that *United States v. Ortega*, 859 F.2d 327, 334-35 (5th Cir.1988), had held that a district judge may revise a sentence under a former version of Fed. R.Crim.P. 35 while an appeal is pending, and the panel in Stafford saw no difference in principle if the revision follows the appellate decision.

Neither of *Stafford's* rationales persuades us. The "practical" consideration not only sleights the idea of jurisdiction as a limitation on power but also is most impractical. How is a district judge to know, when acting in advance of the mandate, whether the court of appeals will modify its judgment on rehearing? What sense would it make to say that a district court has jurisdiction to act, but only if at some later time the court of appeals does not revise its judgment? Jurisdiction is unlike quantum mechanics. Elementary particles can both exist and not exist at the same time, with uncertainty resolved only by the act of observation (this is the point of Schrodinger's cat, which is both dead and alive until the experimenter opens the box). Judicial power needs a more predictable basis. Litigants and judges should be able to know, from facts observable at the time they act, which shell covers the pea. Otherwise time, energy, and money will be wasted because

later events will require hearings to be held anew and opinions rewritten. If the losing party does not seek rehearing and wants the case to proceed with dispatch on remand, it may ask the court of appeals to issue the mandate before its scheduled date. Fed R.App.P.41(a). The prosecutor did not take any such step in our case, and the district court issued its decision while the United States still had time *to* seek rehearing. It would be unfortunate if losing parties could decide whether to seek appellate rehearing on the basis of the district court's proceedings applying the court of appeals' decision, yet that is an invitation *Stafford* and *Ortega* issue.

As for precedent: Ortega is plainly incorrect. Many cases, including *United States v. Cronic,* 466 U.S. 648, 667 n. 42, 104 S.Ct 2039, 2051 n. 42, 80 L.Ed.2d 657 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under Fed.R.Crim.P. 33 but the principle is general. A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose. The district court may not alter the judgment unless the court of appeals grants leave. See *United States v. Kerley,* 838 F.2d 932, 941 (7th Cir.1988); *Janon's Foods, Inc. v Peter Exkrich & Sons,* 768 F.2d 189, 190-91 (7th Cir.1985). We applied this principle to Fed.R.Crim.P. 35(b) in *United States v. Bingham,* 10 F.3d 404 (7th Cir.1993). See also *United States v.O'Connor,* 874 F.2d 483, 489, (7th Cir.1989). Higher authority dictates this outcome. *Berman v. United States,* 302 U.S. 211, 214, 58 S.Ct. 164, 166, 82 L.Ed. 204 (1937), holds that a district judge lacks authority to resentence a defendant while an appeal is pending. Neither *Ortega* nor *Stafford* cited *Berman.* Neither did *Doyle v. United States,* 721 F.2de 1195 (9th Cir.1983), which concluded that a district judge may alter a sentence during an appeal when it is "obvious" to one judge is not so clear to another, setting the stage for disagreement about the propriety of the action. What is more, as we keep repeating, the initial issue is one of

power to act, which cannot be asserted just because a particular substantive decision would be wise. More recent cases in the ninth circuit disavow *Doyle,* at least for cases under the current version of Rule 35,. See *United States v. Ortega-Lopez,* 988 F.2d 70 (9th Cir.1993).

It is evident from decisions such as Kerley, Jason" Foods, and O'Connor that this circuit is committed to a position different from the fifth circuit's. Although one panel of the ninth circuit is on the side of *Ortega* and *Stafford,* another seems mo0re congruent with our understanding, See *United States v. Coleman,* 688 F.2d 663 (9th Cir.1982) (the district court may conduct proceedings before the appellate mandate issues but may not enter a judgment based on those proceedings until receiving the mandate). See also *Ortega-Lopez,* supra. Firmly on our side are the second and eighth circuits, which held in *United States v. Ransom,* 866F.2d 574 (2d Cir..1989), and *Reserve Mining Co. v. EPA,* 514 F.2d, 492, 541 (8th Cir. 1975) (enbanc), that until the mandate issues the district court lacks jurisdiction to hold the proceedings for which the appellate opinion calls.

It would be possible, we suppose, to characterize the district court's proceedings in Kusay's case as an order denying relief from judgment under Fed.Rl.Civ.P. 60(b), a step the district court can take while an appeal is pending. Possible, but not plausible. Kusay did not ask the district court to reconsider the judgment from which an appeal had been taken-a judgment as our order of May 3 recites, denying the petition on the ground that Kusay had forfeited the arguments he presented. The district judge did not revisit the forfeiture question. Instead he conducted the proceedings our order contemplated, addressing a completely different subject. The district judge must have assumed that he had the power to rule in Kusay's favor. Otherwise what was the point? It would be a hoax on prisoners to conduct proceedings that only prosecutors can win-for if the district judge had believed Kusay and disbelieved his former lawyer, the United States doubtless would be asking us to direct the district judge to start over.

"Haste makes waste" is an old adage. It has survived because it is right so often. See *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir.1994). The United States Attorney acquiesced in a swift decision following our order because he did not plan to seek rehearing or file a petition for a writ of certiorari. Perhaps the Solicitor General would have seen things differently, although the lack of a request for rehearing enbanc in *Castellanos v. United States,* 26 F.3d 717 (7th Cir.1994), the basis of our decision, suggests not. No matter. The way to expedite proceedings after an appellate decision is to seek early issuance of the mandate. Neither side did. Instead of reminding the district judge that the case was still pending before this court, the prosecutor participated in the rump hearing in the district court. Because the district court lacked adjudicatory power, those proceedings are a nullity. The district court's order of June j5 īs vacated. Unless Kusay's release from prison induces him to dismiss his petition, the district court must hold another hearing and make a fresh decision. Because Judge Alesia has made up his mind on this subject, the proceedings must be conducted before another district judge under Circuit Rule 36. The mandate will issue. Today.

Appendix

Order

Walter Kusay, Jr., pleaded guilty to mail fraud. Kusay says that he asked his lawyer to appeal the sentence, only to be told: "Wally, you don't have the money to appeal." No appeal was filed. When Kusay sought relief under 28 U.S.C. section 2255, the district court dismissed the petition, holding that all claims had been waived by failure to appeal.

Castellanos v. United States, 26 F3d 717 (7th Cir.1994), which was released after the district court's decision, hold that a lawyer's failure to carry out his client's instruction to take an appeal is ineffective assistance of counsel, entitling the defendant to an

appeal (with the aid of counsel) as if on direct review. This case therefore must be remanded so that the district judge may determine whether Kusay is telling the truth when he says that he asked his lawyer to appeal, and that the lawyer refused.

If the lawyer indeed refused to file a notice of appeal, more than a new appeal lies in store. A criminal lawyer may not abandon a client whose funds have run out. Until relieved by a court, a lawyer must continue the representation-if need be, under the terms of the Criminal Justice Act. Circuit Rule 4. The United States submits that, when the lawyer balked, Kusay had to file his own notice of appeal. No so. Kusay was entitled to the services of an advocate. A lawyer who deserts his client does not foist the burdens of self-representation on the defendant; instead the lawyer brings shame (and) professional discipline) on himself, and the defendant is entitled to a new proceeding with the aid of competent, ethical lawyer.

The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion and with Castellanos.

The following opinion was taken from; In the United States Court of Appeals for the Fifth Circuit, No 83 3540, *Nicol v. Gulf Fleet Supply Vessels.* Appeal from the United States District Court for the Eastern District of Louisiana. Morey L. Sear, Judge.

Before BROWN, GEE and RUBIN, Circuit Judges.

GEE, Circuit Judge:

David Nicol is a foreign seaman who brought suit against five interrelated Gulf Fleet companies to recover for personal injuries suffered aboard a Gulf Fleet tugboat. Nicol is represented by Dale W. Poindexter, who was associate with the law firm of Mammett, Leake & Hammett when Nicol's action was filed in 1980.

Poindexter subsequently withdrew from the firm to establish his own practice, taking the Nicol matter with him. Unfortunately, Poindexter and his former law firm were unable to agree as to the Hammett firm's interest in fees earned for Poindexter's work on the Nicol case before his departure. Likewise, negotiations failed on whether Poindexter's ex-firm was entitled to reimbursement of several thousand dollars in costs expended on the Nicol case upon Poindexster's exodus or upon the conclusion of the case.

[1] The district court dismissed Nicol's suit for lack of subject matter jurisdiction on April 6, 1983; judgment for the Gulf Fleet defendants was rendered five days later. On April 28, 1983, the Hammett firm moved the district court for leave to intervene in Nicol's case to protect the fees and costs it alleged Poindexter owed the partnership[1] But before the court ruled on the motion, Nicol filed his notice of appeal on May 5. A magistrate granted the motion to intervene 20 days later, but the district judge withdrew the leave to intervene several weeks later when ruling upon Nicol" motion to reconsider the magistrate's decision. We affirm the denial of intervention because the district court was without jurisdiction to rule upon the Hammett motion once Nicol had filed his notice of appeal

1. It claimed intervention as of right under Rule 24(a) of the Federal Rule of Civil Procedure, asserting an interest in the proceeding under La.Rev.Stat.Ann section 37:218 (West Supp.1984), which states:

> By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution or defense of which he is employed, whether the claim or suit be for money or for property. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file and record it with the clerk of the court in parish in which the suit is pending or is to be brought or with the clerk of the court

in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as

[2,3] "If an appeal is taken from a judgment which determines the entire action, the district court loses power to take any further action in the proceeding upon the filing of a timely and effective notice of appeal, except in aid of the appeal or to correct clerical errors under Rule 60(a). 9 J. *Moore & B. Ward, Moore's Federal Practice* 203.11 at 3-54 (1983). That is the general rule in this Circuit, and it has been applied to motions for intervention. *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897,928-29. Accordingly the district court in this case was without jurisdiction to rule on the motion to intervene filed by Hammett, Leake & Hammett once Nicol had filed his notice of appeal. The law firm did not subsequently move in this Court for leave to intervene.

Nicol's appeal on the jurisdictional merits of his admiralty case has been decided this day in a separate opinion, *David Nicol v. Gulf Fleet Supply Vessels, Inc. et al,* 743 F.2d 289 (5th Cir.1984). Because we vacate the judgment of the district court and remand the case, Hammett Leake & Hammett may renew its motion to intervene in the district court once our mandate has issued.

The following opinion was taken from; In the United States Court of Appeals for the Seventh Circuit, No. 79-1655, *Armstrong v. Jackson, v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305-328, Appeal from United States District Court for the Eastern District of Wisconsin, John W. Reynolds, Judge.

Before SPRECHER, CUDAHY, Circuit Judges and DUMBAULD, Senior District Judge.

SPRECHER, Circuit Judge.

The issue in this appeal is whether the district court properly approved a settlement agreement terminating the Milwaukee public school desegregation class action after fifteen years of litigation. The intervening class members, the appellants here, contend that the district court failed to apply the correct standard in its evaluation of the settlement agreement. We conclude that the district court acted properly and affirm.

1

The original complaint in this litigation was filed in 1965, pursuant to 42 U.S.C. section 1983. An amended complaint was filed in 1968 alleging that the Milwaukee public school system was unlawfully segregated on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. The trial began in September 1973, and consumed thirty full days on the district court's calendar until its conclusion on January 1974. The parties produced approximately fifty witnesses and hundreds of exhibits during the trial and submitted proposed findings of fact and post-trial briefs after its conclusions. The district court then took the case under advisement.

In January 1976, the district court issued its decision and order, finding that the defendants had knowingly and intentionally carried out a systematic program of faculty and student segregation and had created and maintained a dual school system. *Amos v. Board of School Directors of the City of Milwaukee,* 408 F.Supp. 765, 821 (E.D.Wis.1976). In its decision and order, the district court also certified the litigation as a class action pursuant to Fed.R.Civ.P. 23(b)(2),[1] and appointed counsel for the class. 408 F.Supp. at 771-76.[2] An immediate appeal from the district court's finding of a violation was brought to this court pursuant to 28 U.S.C. 1292(b).

Note footnotes 1 and 2 are on the following page.

In addition to finding a violation of the Equal Protection Clause, the district court, in its initial decision, also permanently enjoined the defendants from any future acts of racial discrimination and appointed a special master to assist in the formulation of an appropriate remedy. While defendants appeal was pending, they petitioned the district court to stay enforcement of the permanent injunction and to revoke the appointment of the special master until

1. Rule 23 of the Federal Rules of Civil Procedure provides, in relevant part:
(a)Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
* * * * * *
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole;
* * * * * *
Fed.R.Civ.P. 23(a),(b)(2).

2. The district court certified the case as a bipartite Rule 23(b)(2) class action One class consisted of all black pupils then enrolled and those who would in The future becomes enrolled in the Milwaukee public school system. The Second class consisted of non-black pupils then enrolled and those who Would in the future become enrolled in the system. 408 F.Supp. at 775-76. The court appointed two attorneys as class counsel, one to represent the Named plaintiffs and the other to represent the unnamed plaintiffs. *Id.* at 775.

final resolution of the appeal by this court. In a decision issued in May 1976, the district court declined to stay the injunction, revoke the appointment of the special master or suspending his activities. *Armstrong v. O'Connell,* 416 F. Supp. 1325, 1344 (E.D.

Wis.1976)[3] Soon thereafter, the district court ordered the defendants to begin desegregation of students and faculty pursuant to an interim plan. *Armstrong v. O"Connell,* 416 F.Supp. 1344 & 1347 (E.D.Wis.1976). The defendants complied with the district court's order and exceeded the goals established by the court.

This court issued its decision affirming the district court's initial finding of a constitutional violation in July 1976. *Armstrong v. Brennan,* 539 F.2d 625, 637 (7th Cir. 1976). Defendants filed a petition for certiorari in the Supreme Court in December 1976, after unsuccessfully petitioning this court for rehearing and rehearing en banc. -While the certiorari petition was pending in the Supreme Court, the district court held further hearings with respect to the adoption of a final desegregation plan for the Milwaukee public schools. In March 1977, the district court issued its final desegregation order, which encompassed both faculty and student body desegregation. *Armstrong v. O'Connell,* 427 F. Supp. 1377 (D.D. Wis.1977). The defendants appealed from this order, but also began to act in compliance with it.

The Supreme Court granted defendants' petition for certiorari in June 1977, and, in a percuriam order, vacated this court's judgment and remanded the case for reconsideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) and *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977). *Brennan v. Armstrong,* 433 U.S. 672, 97 S.Ct. 2907, 53 L.Ed.2d 1044 (1977). On remand from the Supreme Court, this court vacated and remanded both the district court's original liability decision and

3. In its May 1976, order, the district court also disposed of defendants' request for a stay of proceedings relative to an award of attorneys' fees, 416 F.Supp. at 1332-35, and their request that the court revoke its appointment of counsel for the absent members of the plaintiff class. 416 F.Supp. at 1340-42.

Its final desegregation order. 566 F.2d 1175 (7th Cir. 1977)

On remand, the district court allowed the parties to supplement the record with respect to the issue of segregation intent. This supplementation amounted to a hearing consuming twenty-seven days, during which sixty-five witnesses were called and almost 1,000 new exhibits were admitted; the record doubled in size as a result. On the basis of the expanded record, the district court found that the defendants had discriminated against the plaintiffs with segregative intent in violation of the Equal Protection Clause. *Armstron v. O'Connell,* 451 F.Supp. 817, 820 (E.D.Wis.1978). Another evidentiary hearing, this one consuming eight days, was then conducted with respect to the present effects of the past segregative acts of the defendants. The district court found that the defendants' violations had had a "pervasive, system wide impact [requiring] . . . system wide remedy encompassing both student population and teacher assignment . . . .." *Armstrong v. O'Connell,* 463 F.Supp. 1295, 1309 (E.D. Wis.1979). The court did not order any particular remedial action at that time; it instead ordered the parties to submit proposed desegregation plans.[4] *Id.* at 1310.

On March 1, 1977, the plaintiffs and defendants submitted for the court's approval a proposed settlement agreement; the agreement was the product of nine months of negotiations between counsel for both sides. This settlement agreement, which is the subject of this appeal[5] deals only with desegregation of the

4. A court-ordered interim desegregation plan was in effect at this time. The Milwaukee public schools had been operating pursuant to such a plan for three academic years, since the interim orders for the 1976-77 school year had been issued by the district court. *Armstrong v. O'Connell,* 416 F.Supp. 1344 & 1347 (E.D.Wis. 1976). Similar plans were put into effect for the 1977-78 and 1978-79 school years pending final resolution of this dispute. In fact, in its evaluation of the present effects of defendants' segregative acts, the district court focused on the 1975-76 school year because, after that year, the Milwaukee public schools were being desegregated pursuant to the court's orders. 463 F.Supp. 1295, 1305.

5. Pursuant to the terms of the settlement agreement, the defendants agreed not to appeal from the district court's decisions finding that they had violated the Equal Protection Clause and that the violations had had a system wide impact requiring system wide remedy.

Would not approve of its terms. The court held an initial hearing on March 5, 1979, to determine whether the settlement agreement was within the range of possible approval; finding that it was, the court approved a class notice which was sent to all class members on March 14, 1979, and published in five Milwaukee newspapers.[6] The notice informed all class members of their right to appear at the scheduled fairness hearing and of the procedures to be followed in making oral or written objections to the proposal.

At the fairness hearing, which was conducted on March 26, 27 and 29, 1979, the district court heard statements from all counsel, received a number of exhibits, and heard testimony from several witnesses and from forty-five class members responding to the notice, most of whom opposed the settlement. On the basis of this information, the district court, after a careful analysis of the factors to be considered in evaluating a class action settlement, entered its order approving the settlement agreement, *Armstrong v. Board of School Directors,* 471 F.Supp.800, 813 (E.D. Wis.1979). The intervening class members appeal from this order.[7]

6. The class notice is reproduced as Appendix B to the district court's opinion approving the settlement agreement. *Armstrong v. Board of School Directors,* 471 F. Supp. 800, 821-24 (E. D. Wis. 1979).

7. The notice of appeal filed in this case by the intervening class members indicates that the appeal is taken from the district court's order of May 11, 1979. That order encompasses not only the settlement agreement as to student population desegregation, but also the faculty desegregation remedy ordered by the district court. Which was not the subject of a settlement. The intervening class members apparently do not appeal from the faculty desegregation order. The briefs filed in this court raise no specific objections to that order and the "Statement of Issues Presented for Review" in the intervenors' brief makes no mention of it. Indeed, it appears from their brief that the intervenors may not have been aware that a faculty desegregation order had been issued. See Brief of the Appellants at 18-19 n.23. Accordingly, we consider only the district court's approval of the student desegregation settlement properly before us and will not address the faculty desegregation order. The district court's decision with respect to the faculty desegregation remedy is published at 471 F.Supp. 827 (E.D.Wis 1979).

On June 11, 1979, the intervening plaintiff's filed a motion in the district court for leave to intervene for the purpose of seeking an order vacating the settlement approval or, alternatively, for the purpose of appealing from that approval. The district court in an order issued June 20, 1979, denied the motion on the ground that the notice of appeal contemporaneously file by the intervening plaintiffs had transferred all jurisdiction over the case to this court, thus depriving the district court of jurisdiction to grant the motion. The district court indicated, however, that if it had possessed jurisdiction, it would have permitted intervention for purposes of appeal but would not have vacated the settlement. The intervening class members also appeal from the district court's denial of their motions to intervene.

II

The settlement agreement is published as Appendix A to the district court's decision, 471 F.Supp. 800, 813-20; it is therefore unnecessary to discuss its terms in detail in this opinion. We will, however, briefly describe its most important provisions insofar as they are relevant to our review of the district court's order.

The settlement agreement begins with a recital of the protracted history of the Milwaukee school desegregation litigation and a brief explanation of the reasons underlying plaintiffs' and defendant's decision to terminate the dispute through settlement. The first substantive provision of the agreement permanently enjoins the defendants, their successors, officers and agents from discriminating on the basis of race in the operation of the Milwaukee public schools. 471 F.Supp. at 815. The agreement contains one other injunctive provision, which requires that decisions respecting school openings and closings and the location of specialty programs not be made in a racially discriminatory manner. 471 F.Supp. at 818.

In addition to the injunctive provisions, the agreement places affirmative obligations upon the defendants in terms of active desegregation of the Milwaukee public schools. Every student

Student in the system is given the right to attend a desegregated school "upon request; defendants are required to provide annual written notice of this right to all students. 471 F. Supp. At 815. The defendants also must assign students within the system so that a certain minimum number are enrolled in desegregated schools.[9] This minimum number is derived by means of a formula contained in the agreement and will vary with the system's total and minority enrollment. 471 F.Supp. at 815. Application of the agreement precludes the existence of any all-white schools in Milwaukee; the desegregation formula, however, leave open the possibility that some all-black schools will persist. The formula does not require that any one-race schools exist and defendants are free to go beyond the order's minimum requirements to eliminate all one-race schools in the Milwaukee public school system. 471 F.Supp. At 816.[10] In addition, the agreement requires that defendants

8. The agreement defines "desegregated school" as follows: A "desegregated " school for purposes of student desegregation is defined as (1) Each elementary or junior high school which has a student population composed of not less than 25% and not more than 60% black students and (2) Each senior high school which has a student population composed of not less than 20% and not more than 60% black students. 471 F.Supp.815.
9. This section of the settlement agreement speaks in terms of defendants' "good faith" assignment of students to achieve particular desegregation "goals." While this choice of phrasing suggests that the provision is advisory rather than mandatory, the district court clearly considered it mandatory and regarded the prescribed desegregation standards as minimum requirements rather than as mere aspirations. 471 F.Supp. 809. We also have been informed that :all parties to this action have understood the order to mandatory." Brief of Amici Curiae at 3. See also Joint Brief of Plaintiffs-Appellees and Defendants-Appellees.
10. Because the formula provided in the settlement agreement depends upon variables such as the total enrollment and the total black enrollment in the total black enrollment in the Milwaukee public schools, it is difficult to state with any degree of precision what the actual desegregative effect of the agreement will be. The district court recognized this difficulty and published, as Appendix C to its order, 471F.Supp. at 825, a table presenting the predicted effect of the agreement based upon the projected enrollment in each of the five years during which the agreement will be in effect.

continue to implement the pre-existing "racial balance" transfer system which permits student transfers only where they will enhance the racial balance of the system. 471 F.Supp. at 815, 819-20. In order to ensure the success of the settlement agreement as an educational and social, as well as a legal, venture, the defendants are required to develop and implement a "human relations program for students" which will aid in the achievement of quality education and successful desegregation. 471 F.Supp. at 816.

The agreement establishes a procedure whereby the defendants'

The table presents projections of the minimum, most probable, and maximum percentages of students enrolled in desegregated schools for each year. In each case the maximum desegregation attainable under the agreement is 100%, the most probable exceeds 75%, and the minimum varies from 75% in the first year to approximately 60% in the final year.

Expert testimony below indicated that the minimum levels are " a realistic impossibility" because Milwaukee public schools have already exceeded these requirements. To achieve the minimum levels, the defendants would have to reassign "massive numbers" of black students out of schools which are presently desegrated. 471 F.Supp. at 808. Attainment of the maximum levels is similarly unlikely because it would require a perfect distribution of students within the Milwaukee public school system joined with the assignment of some black students to suburban public school systems." *Id.* As the district court noted, such a metropolitan area remedy would make good sense and could be voluntarily implemented, but could not be required on the facts in this in this case. 471 F.Supp. at 808 n.2.

The court was also concerned with amici curiae's prediction that a Substantial percentage of the system's black students could be attending non-desegregated schools by the time of the plan's expiration. The court took note of the possibility that as many as 35% of the system's black students might not be enrolled in desegregated schools in the final year of the agreement On the basis of the expert testimony and other provisions of the agreement, however, the court concluded.

[T]he dire predictions of amici will not be fulfilled, and, furthermore . . . . . their fulfillment would mean that defendants had engaged in conduct violative of the settlement agreement and unlawful under the Fourteenth Amendment to the United States Constitution.

471 F.supp. at 809. See also 471 F. Supp. At 809 n.3.

compliance with its provisions shall be monitored by a United States Magistrate and by a five-member monitoring board appointed to assist him. Individual class members may file complaints of noncompliance with the board; the Superintendent of Schools must respond to such complaints and the monitoring board may investigate further if it finds the response insufficient. The board may recommend to the Magistrate that action be taken on particular complaints. The board and plaintiffs' counsel have the right, upon reasonable notice, to visit any school in the system to determine whether it is in compliance with the terms of the agreement. In addition, the defendants are required to submit periodic reports regarding the racial composition of the Milwaukee public schools. Decisions of the board may be reviewed by the Magistrate with a right of appeal to the district court. The monitoring procedure will remain in effect throughout the full five year duration of the settlement agreement.[11] 471 F.Supp. at 815-18.

Finally, the agreement provides for the payment of $550,000.00 in fees and $13, 428.11 expenses to counsel for the named plaintiffs and $300,000.00 in fees and $29, 350.00 in expenses to counsel for the absent class members in complete payment for services rendered and expenses incurred in this litigation. 471 F.Supp. at 818-19. The district court readily approved the payments because it was

> Well aware of [counsel's] competence, of the time and labor Spent by them, of the magnitude and complexity of this Litigation, of the responsibility undertaken by them, of the work Performed by them out of court in preparation for court proceedings, And of what they have achieved during this litigation.

11. The settlement agreement is to remain in effect for five full years over and above the three years of court ordered desegregation which have already occurred. Contrary to the suggestion of the intervenors, Brief of the Appellants at 13 n.18. the agreement does not provide for a gradual five Year phase-in-of the full force from the first year to the fifth. See Brief Of Amici Curiae at 4-5.

471 F.Supp. at 811. The court went on to comment that it was

> satisfied that the amount offered them in settlement of their claim for services rendered is less than the Court would have awarded had it been required to decide the issue of fees, but not too small that it will discourage attorneys in the future from undertaking class representation in cases of public interest. Therefore, the Court finds that the portion of the settlement agreement which deals with compensation for plaintiffs' attorneys is fair, reasonable, and adequate under all of the circumstances of this case.

Id. at 811. No party to this appeal raises any specific objections to this aspect of the district court's order

> The district court carefully considered each of the settlement terms outlined above as well as the strength of plaintiffs' case on the merits, the complexity and expense of further litigation, the opinion of counsel for both sides, and all of the other factors which must be weighed when any class action settlement is presented for approval. We do not understand the intervening plaintiffs to argue that the court somehow misapplied the class action standard should not have been applied at all. It is to this argument which we direct our primary attention.

III

A

[1] It is axiomatic, that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. *U.S v. McInnes,*. 556 F.2d 436, 441 (9th Cir. 1977) *Du Puy v. Director, Office of Workers; Compensation Programs,* 519 F.2d 536, 541 (7th Cir. 1975), *cert denied,* 424 U. S. 965, 96 S.Ct. 1459, 47 L.Ed. 2d 732 (1976). In the class action contex in particular, "there is an overriding public interest in favor of settlement." *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977). Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources. *Id.*

Settlement of a class action is not, however, an unmixed blessing. Balanced against the "overriding public interest in favor of settlement" are strong countervailing public policies which counsel

against automatic judicial acceptance of such agreements. First and foremost is the fact that most of those whose rights are affected by a class action settlement- the members must rely upon the representation of the class representatives and class counsel to protect their interests. While this representation is no doubt vigorous in most cases, on occasion the negotiating parties may find that their individual interest can best be served by a settlement which is not in the best interests of the class as a whole. Similarly, class counsel may be persuaded by the prospect of a substantial fee to accept a settlement proposal which leaves the class with less relief than could have been procured through more vigorous negotiation. In such cases, the class members may find that substantial rights have been bargained away in exchange for relief which inures primarily to the benefit of a few class members or class counsel. See *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 1120 (7th Cir. 1979), *cert denied,* --U.S. –100 S.Ct. 146, 62 L.Ed.2d 95 (1979); *Moreland v. Rucker Pharmacal Co.,* 68 F.R.D. 611, 615 (W.D. La. 1974).

In addition to this concern with the interests of class members, there is a concern with the interests of the public as a whole. The substantive issues involved in many class actions reflect a broad public interest in the rights of individual class members. This public interest is present not only in civil rights suits such as the one now before us, but also in such economic litigation as antitrust and consumers; rights actions. Uncritical acceptance of a class action settlement can, therefore, disturb important national policies beyond the immediate impact upon the rights of class members. See *Developments in the Law-Class Actions,* 89 Harv.L.Rev. 1318, 1536-39 (1976).

[2] To safeguard the rights of class members and allow consideration of the broader implications of a class action settlement, Rule 23(e) of the Federal Rules of Civil Procedures requires that a notice of a proposed settlement be sent to all class members and that judicial approval of settlement offers be procured

prior to dismissal of a class action.[12] Rule 23(e) does not specify any particular standard which a settlement must satisfy nor does it provide for a procedure within which settlement proposals should be reviewed. The courts of appeals have required that district court approval of a settlement pursuant to Rule 23(e)be given only where the district court finds the settlement fair, reasonable and adequate. See e.g.., *Grunin v. International House of Pancakes,* 513 F.2d 114 123 (8th Cir.), *cert denied,* 423 U.S. 864, 96 S.Ct. 124 46 L.Ed.2d 93 (1975). A district court's determination that a settlement is fair, reasonable and adequate will be reversed on appeal only upon a clear showing that the court abused its discretion. *Dawson v. Pastrick,* 600F.2d 70,75 (7th Cir. 1979; *E.E. O.C. v. American Telephone & Telegraph,* 556 F.2d 167, 174 (3d Cir. 1977) *cert. Denied,* 438 U.S.915, 98 S.Ct. 3145, 57 L.Ed2d 1161 (1978).

[3-5] District court review of a class action settlement proposal is a two-step process. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." This hearing is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Manual for Complex Litigation* section 146, at 53-55 (West 1977).[13]

12. Rule 23 (e) provides: (e) dismissal or compromise. A class action Shall not be dismissed or compromise without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner asw the court directs. Fed.R. Civ.P. 23(e), An identical provision is contained in Rule 23.1, governing shareholders' derivative suits. Fed R.CivP. 23.1.

13. As the district court correctly noted, this court has endorsed the Concept of a pre-notification determination of "probable cause." To proceed with review of a settlement proposal, 471 F.Supp. 800,804. In *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979), *cert. Denied,* - U.S.-, 100 S.Ct. 146, 62 L.Ed2d 95 (1979), wee indicated that the failure of the trial court to hold a preliminary hearing prior to the mailing of the notice of the proposed settlement is [not] inevitably reversible error. [However] we believe such a hearing is better practice and the Manual for Complex Litigation recommends it . . 594 F.2d at 1133. We continue to adhere to this view

If the district court finds a settlement proposal "within the range of possible approval," it then proceeds to the second step in the review process, the fairness hearing. Class members are notified of the proposed settlement and of the fairness hearing at which they and all interested parties have an opportunity to be heard. The goal of the fairness hearing at which they and all interested parties have an opportunity to be heard. The goal of the fairness hearing is

> To adduce all information necessary to enable the judge intelligently to Rule on whether the proposed settlement is "fair, reasonable, and adequate."

Manual for Complex Litigation at 57. On the basis of all information available to him, the trial judge must decide whether or not to approve the proposed settlement.

[6] Although review of class action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. The district court's opinion approving the settlement now before us listed these factors:

> Among the factors which the Court should consider in judging the fairness of The proposal are the following:
> "(1) ' * * * the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';
> "(2) ' [T]he defendant's ability to pay';
> "(3) ' [T]he complexity, length and expense of further litigation';
> "(4) ' [T]he the amount of opposition to the settlement';"
> Manual, supra, at 56.
> Professor More notes in addition the factors of:
> "(1) * * *
> "(2) Presence of collusion in reaching a settlement;
> "(3) The reaction of members of the class to the settlement;
> "(4) The opinion of competent counsel;
> "(5) The stage of the proceedings and the amount of discovery completed."
> 3B Moore's Federal Practice 23.80[4] at 23-521 (2d ed.1978)

471 F.Supp. at 804. As the district court noted, the first factor, the strength of plaintiffs' case on the merits balanced against the settlement offer, is generally regarded as the most important. See *Grunin v. International House of Pancakes,* 513 F.2d 114, 124 (8th

Cir.), *cert. Denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); *Detroit v. Grinnell Corp.,* 495 F.2d. 448, 455 2d Cir. 1974) While consideration of this factor will require some evaluation of the merits of the dispute, the district court must refrain from reaching conclusions upon issues which have not been fully litigated. *Detroit v. Grinnell Corp.,* 495 F.2d at 456; *Patterson v. Stovall,* 528 F2d 108, 114 (7th Cir. 1976).

[7] In making its fairness determination, the district court must not forget that it is reviewing a settlement proposal rather than ordering a remedy in a litigation case.
As the second circuit noted:

> The court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case

Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974). Nonetheless, the district court must clearly set forth in the record its reasons for approving the settlement in order to make meaningful appellate review possible. *Dawson v. Pastric,* 600 F.2d 70, 75-76 (7th Cir. 1979). This is particularly important in civil rights class action See e. g., *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799, 804 (3d Cir.), *cert. Denied,* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed2d 146 (1974)(employment discrimination). Even in such cases, however, the court's reasoning need not be so specific as to amount to a judgment on the merits. *Id.*

[8] Courts of appeals, in reviewing district court approval of class action settlement, engage in an even more limited inquiry khan the district court. In determining whether a district court abused its discretion, a court of appeals focuses not on the substantive law governing the claims asserted in the litigation, but on the general principles governing approval of class action settlements. As this court noted in recent Title VII class action:

> [W]e must recognize that we are here reviewing the propriety and not a judgment rendered after trial. We believe that the issues raised by the intervenor should not be decided on the basis of Title VII law, but rather must be decided on the basis legal principle regulating judicial review of settlement agreements.

Airline Stewards & Stewardesses Ass'n v. American Airlines, Inc. 573 F.2d 960, 963 (7th Cir.), *cert. Denied* 439 U.S, 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978). See also *Dawson v. Pastrict,* 600 F.2d 70, 75 (7th Cir. 1979). Courts of appeals view the facts in the light most favorable to the settlement *Patterson v. Stovall,* 528 F.2d 108,112 (7th Cir 1976). In addition, they do not focus on individual components of settlements, but rather view them in their entirely in evaluating their fairness. *McDonald v. Chicago Milwaukee Corp.,* 566 F.2d 115, 425 (7th Cir. 1977); *Cotton v. Hinton,* 559 F.2d 1326, 1331-32 (5th Cir. 1977). Such deference is due the judgment of the district judge because of his familiarity with the litigants, the history of the litigation and the merits of the substantive claims asserted. *Ace Heating & Plating Co. v. Crane Co.,* 453 F.2d 30, 34 93D Cir. 1971).

The principles governing district court and court of appeals review of settlement proposals seek to take account of the special concerns implicit in class action settlements while still preserving the essential character of settlement of a lawsuit. Whether the lawsuit being settled is a civil rights class action or a simple two-Party contract suit, the essence of a settlement is compromise- an abandonment of the usual total-win versus totai-loss philosophy of litigation in favor of a solution somewhere between the *two* extremes. This court has, on more than one occasion, taken note of this essential character, stating that "the essence of a settlement is a bilateral exchange. The inherent nature of a compromise is to give up certain rights or benefits in return for others.' " *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 1135 (7th Cir. 1979). See also *Patterson v. Stovall,* 528 F.2d 108, 115

(7th Cir. 1976); *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 425, 429 (7th Cir. 1977). Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.

IV

A

The initial issue with which we are faced on this appeal is whether the principles outline above governing judicial approval of class action settlements are to be applied in this case or whether the settlement before us must be evaluated according to some more stringent standard of review. The district court applied class action settlement principle to the settlement proposal, found it fair, adequate and reasonable, and thus approved it. The settlement's proponents, of course, argue that the district court acted properly in approving the settlement. The intervenors, on the other hand, argue in effect that, because the district court had already found a constitutional violation with a system-wide impact, the settlement should have been evaluated as if it had been presented for the district court's consideration as a possible remedy in a fully litigated dispute.[14] They go on to assert that the settlement cannot be approved because it stops short of providing the degree and scope of desegregation relief available in school desegregation suits which are litigated to a final conclusion.[15]

14. Nowhere in their brief do the intervenors acknowledge that class action settlements are usually reviewed according to a standard different from that applied to orders proposed by the parties to be entered after full litigation. At oral argument, however, intervenors' counsel stated that their position was once a constitutional violation is found, the remedy must meet the same constitutional standards whether it is the result of settlement or full litigation. In accordance with their view that the procedural context this appeal is irrelevant, the intervenors' brief never mentions the class action standard and focuses instead upon Supreme Court decisions regarding the appropriate remedial action to be ordered in fully litigated school desegregation cases.

Suits which are litigated to a final conclusion.[15]

The underlying question implicit in the intervenors' argument is whether it is possible to "settle" the remedial portion of a school desegregation class action at all. As we noted in Part III, *supra.* The essence of settlement is a compromise in which both parties relinquish some rights in order to gain benefits which would not otherwise be available or would be available only at the expense of further litigation. The intervenors appear to argue that once liability is established in a school desegregation suit, the plaintiff may not agree to any compromise as to the remedial portion of the suit; the plaintiffs may not exchange their potential; right to a particular remedial plan for other remedies or programs or for a speedy final resolution of the litigation. Such a rule would effectively preclude settlement because, by prohibiting any meaningful compromise as to remedy, it would eliminate the element of exchange which is at the heart of settlement of any litigation. The essence of the intervenors' position seems to be that this element of exchange, while mot desirable in purely economic litigation, is inappropriate when rights of constitutional stature are involved.

The issue raised by the intervenors appears to be one of first impression in the federal courts. Although resolution of school desegregation controversies by way of settlement or consent decree is not uncommon[16] our research has uncovered no case in which such a resolution was challenged on the fundamental basis asserted here. However, other varieties of civil rights litigation, particularly employment discrimination class actions, are frequently resolved by settlement and these settlements are often reviewed by courts of appeals. These cases provide a useful analogy in the school

15. As the intervenors state their position:

> Having made the findings of unconstitutional behavior, the district Court's duty extended beyond the mere issuance of proper sounding Conclusions of law, but extended into the realm of using the full range of Its equitable powers to accomplish the remedial task. The District Court Was required to instruct the defendants that they were to utilize all Necessary techniques capable of effecting the desegregation.

Brief of the Appellants at 12. See also *id.* 14, 18, 21.

16. See, e. g., *Wright v. Baker County Bd of Educ.*, 501 F.2d 131 (5th Cir. 1974); *Lee v. Attalla City School System,* 558 F.2d 499 (5th Cir. 1979;

desegregation contest.

Settlement of an employment discrimination class action would seem to raise many of the concerns expressed by the intervenors in this case. Although it is difficult to rank civil rights in terms of importance, it is clear that the rights involved in employment discrimination and school desegregation cases are similar in scope, origin and significance[17] Despite this fact, in the many court of appeals decisions which review district court approval of settlements in employment discrimination class actions, there are no suggestions that the importance of substantive rights involved precludes compromise or requires a special standard of review. While the terms of such settlements are to be evaluated by the district courts with particular care, in view of the public policies implicated in these suits, the courts must also keep in mind the policy favoring settlement. *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977); *Mandujano v. Basic Vegetable Products, Inc.,* 541 F.2d 832, 835-36 (9th Cir. 1976).[18]

Liddell v. Caldwell, 546 F.2d 768 (8th Cir. 1976),*cert. denied* 433 U.S. 914 97 S.Ct. 2987,53L.Ed.2d 1100 (1977).Although none of these cases address the issue confronting us in this case, all indicate that voluntary resolutions of school desegregation suits can and do occur.

17. Although most employment discrimination suits are based upon a statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.,* while school desegregation suits are based directly on the Constitution, through 42 U.S.C. Section 1983, it is clear that both types of litigation have s their foundation the notional policy against invidious discrimination. It is well settled that Title VII "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *United Steelworkers v. Weber,* 443 U.S. 193, 206 n6, 99 S.Ct. 2721, 2729 n.6. 61 L.Ed2d 480 (1979). However, the fact that a Title VII plaintiff need not establish Discriminatory intent or state action, as required of his Fourteenth Amendment counterpart, in no way affects the analogous character Of the rights at issue in both types of litigation. A primary objective of Title VII is solution of the problem of racial discrimination in Employment. *Weber, supra,* 443 U.S. at 200-204m99 S.Ct. at 2726-28. School desegregation suits seek solution of the same problem in the Context of public education. Both varieties of litigation concern the Concern the fundamental right to be free of invidious discrimination And therefore stand on a similar footing with respect to the need for Judicial scrutiny of settlement proposals.

The appropriate balance between the public policies involved in struck by application of the class action settlement principles described in Part *supra.* District courts regularly apply these principles to employment, discrimination settlements and are reversed on appeal only for an abuse of discretion. See, e.g., *Dawson v. Passtrick,* 600 F.2d 70, 74 (7th Cir. 1979); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1170 (5th Cir. 1978), *Cert. Denied,* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Cotton v.* Hinton, 559 F.2d 1326, 1329 (5th Cir. 1977). Such settlements may provide for the compromise of some of the remedies potentially available to the plaintiff class as long as the settlement as a whole is fair, reasonable and adequate. See e.g., *Airline Stewards & Stewardesses Ass'n v. American Airlines,* 573 F.2d 960, 964 (7th Cir.), *cert. Denied,* 439 U.S. 876, 99 S.Ct. 214 58 L.Ed.2d 190 (1978).[19]

18. There is a particularly strong policy in favor of settlement of Title VII class actions because the statute itself emphasizes voluntary conciliation. *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Circ. 1977). However, as the Fifth Circuit made clear in *Cotton,* this statutory policy merely augments The already strong judicial policy favoring settlement. *Id* at 1330-31. We Believe that this judicial policy is an appropriate consideration in school Desegregation suits.

19. In the *Airline Stewards* case, this court made the following statement with respect to a hypothetical situation where some class members object to a settlement because it does not, in their view, provide sufficient relief:

> It may well be that the minority members of the class will have to Forego the full retroactive competitive seniority provided in *Franks* [*Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444], so that the majority may acquire some benefits and yet Avoid the costs and uncertainties of litigation. Such a decision would Have to be made on a case-by-case basis.

573 F.2d at 964-65 n.9.

[9,10] The employment discrimination cases cited above persuade us that, despite the importance of the substantive rights of the class members, settlement is an appropriate method of arriving at a school desegregation remedy. While courts should be extremely sensitive to the possibilities for abuse where a compromise of the civil rights of a class is proposed, a blanket prohibition o9f compromise could result, in many cases, in abandonment of the substantial benefits which can result from voluntary resolution of litigation, without a commensurate increase in the protection accorded the civil rights of the class. Indeed, it appears that school desegregation is one of the areas in which voluntary resolution is preferable to full litigation because the spirit of cooperation inherent in good faith settlement is essential to the long range success of any desegregation remedy. Cf. *Patterson v. Newsspaper & Mail Deliverys' Union,* 514 F.2d 767,771 (2d Cir. 1975), *cert. denied,* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976) (employment discrimination). Accord *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977). A remedial decree reached through agreement between the parties may, because of the community cooperation it inspires, more effectively implement the constitutional guarantee of equal protection than a seemingly more stringent court-ordered remedy which the community views as imposed upon it form the outside. See *Williamsburg Fair Housing Committee v. New York City Housing Authority,* 450 F.Supp. 602, 606 (S.D.N.Y. 1978) (fair housing). The observations of the district court in *Tate v. Werner,* 68 F.R.D. 513 (D.D.Pa.1975), a prisoners' rights class action, are equally appropriate in the school desegregation context:

> We were well aware of the subtlety of the alleged discrimination and the Uncertain efficacy of any relief unless all parties were willing to Participate in the Court's decree. Under these circumstances, a Settlement . . . presented the most appropriate solution to the Controversy.

Id. at 521. We are unwilling to forego the potential benefits of

Settlement of school desegregation cases.[20] The standard of review applied by the district court in this case, when applied flexibly on a case-by case, ensures the maximum protection possible for the rights of class members consistent with the public interest in resolution of such litigation by settlement.

[11] As a corollary to the argument that the district court's application of the class action standard was inappropriate in this case, it is urged that this court employ a standard of review more stringent than the usual abuse of discretion standard. The basis for this suggestion is explained by amici as follows:

> In this case the plaintiffs raise substantial constitutional claims. The Case is one of broad public importance and significance. In this regard this case differs substantially from cases where a class of plaintiffs is seeking money damage relief for economic harms suffered in violation of the law.

Brief of Amici Curiae at 5. This argument misconceives the reasoning which underlies court of appeals deference to district court approval of class action settlements. The abuse of discretion standard is employed not because the courts of appeals consider the economic claims involved in most class actions too insignificant to deserve closer scrutiny, but rather

> Because [the trial judge] is exposed to the litigants, and their strategies, Positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

20. In a related context, the Second Circuit recently emphasized the Importance of settlement in school desegregation cases. In U.S. & *South End Educational Committee v. Bd. Of Educ of Waterbury,* 605 F.2d 573 (2d Cir. 1979), the court based its flexible interpretation of the attorney's fees provision of the Emergency School Aid Act, 20 U.S.C. section 1617, in part upon the need to encourage "compromise or concession" in order to facilitate settlement of the remedial portions of school desegregation cases. 605 F.2d at 576.

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). The consistent application of the abuse of discretion standard in employment discrimination cases reveals that it is not reserved only for purely economic litigation. See, e.g. *E. E. O. C. v. American Telephone & Telegraph,* 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied,* 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed2d 1161 (1978); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1168-69, 1214 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Dawson v.Pastrick,* 600 F.2d 70, 75-76 (7th Cir. 1979).

We can imagine no case in which deference to the judgment of the district court is more appropriate than the present one. This litigation has been before the same district judge for its entire fifteen-year history. He has issued hundreds of pages of published opinions, has heard voluminous testimony and reviewed countless documents, and has ruled on a variety of issues ranging from preliminary procedural matters to the substantive merits of the plaintiffs' constitutional claims. His familiarity with the litigants and the litigation is a valuable asset which should not lightly be discarded. In the absence of a showing of exceptional circumstances, we decline to do so. The abuse of discretion standard will govern our review of the district court's review of the settlement proposal.

Despite our resolution of the issues discussed above, we believe that the intervenors' position is not wholly without merit. Their concern that constitutional requirements might be frustrated through the use of settlement agreements in school desegregation class actions is a valid one deserving serious attention. The Eighth Circuit expressed a similar concern in *Liddell v. Caldwell,* 546 F.2d 768 (8th Cir. 1976), *cert. denied,* 433 U.S. 914, 97 S.Ct. 2987, 53 L.Ed.2d 1100 (1977), and clearly indicated that a school desegregation plan devised through voluntary means, in that case a consent decree, must attain a certain minimum level of

Constitutional compliance. *Id.* at 773-74.[21] A federal court cannot permit an agreement between counsel for the defendants and counsel for the plaintiff class seriously to undercut the constitutional policy requiring desegregation of our nation's schools; this is true even where the class members themselves do not oppose a particular settlement. At the same time, however, the court cannot disregard the desire of the litigants amicably to settle their litigation nor can it ignore the substantial benefits which can accrue to both the class members and the general public from a fair and adequate settlement of school desegregation controversy.

[12-14] The accommodation of these potentially competing interests can be achieved within the framework of the class action settlement standard. Inherent in this standard are two characteristics which ensure that federal courts reviewing class action settlements will give due consideration to the public interests implicated in the suits before them. First, as has been recognized in *employment* discrimination cases, while the relative importance of the substantive claims asserted in civil rights class actions does not require abandonment of ordinary settlement principles, it does require that both district court and the courts of appeals apply these principles with particular care and state their reasoning with particular clarity. See, e.g., *Bryan v. Pittsburg Plate Glass Co.*, 494 F.2d 799, 804 (3d Cir. 1974); *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977). The strength of the class action settlement standard lies in this flexibility; in applying it a district judge may adjust his inquiry to give constitutional claims the close scrutiny they deserve while still allowing ample room for settlement and compromise. Second, implicit in the class action settlement standard is a requirement that no settlement be approved which

21. The *Liddell* court was not actually confronted with the issue discussed in the text. Its comments were made in the context of an opinion reversing a district court's refusal to allow objecting class members to intervene to oppose a consent decree in a school desegregation case.

Either initiates or authorizes the continuation of clearly illegal conduct. *Robertson v. National Basketball Ass'n,* 556 F.2d 682, 686 (2d Cir. 1977); *Grunin v. International House of Pancakes,* 513 F.2d 114, 123-23 (8th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975).[22] A school desegregation settlement which authorizes clearly unconstitutio0nal behavior is, on its face, neither fair, reasonable nor adequate as required by the class action standard. In applying this principle, however, the court must not decide unsettled legal questions; any illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis. *Robertson, supra,* 556 F.2d at 686; *Grunin, supra,* 513 F.2d at 123-24.

Application of the class action settlement standard within these guidelines guarantees that civil rights, and other class action, litigants have reasonable latitude in negotiating a settlement without undercutting important national policies on their way to reaching agreement. Having articulated the relevant principles, we turn now to their application to the case before us.

C

[15] In reviewing for an abuse of discretion the district court's approval of the settlement, the first step is to determine whether the settlement initiates or authorizes any clearly illegal or unconstitutional conduct. The intervenors' brief is sprinkled with references to the constitutional inadequacy of the desegregation plan contained in the settlement agreement. Their objections appear to fall into three specific categories. First, they claim that

22. The only cases our research has uncovered which articulate this limitation in this manner are antitrust class actions. However, the principle is clearly implicit in all opinions evaluating class action settlements and seems to underlie the Eighth Circuit's comments in *Liddell v. Caldwell,* 546 F.2d 768, 773-74 *8th Cir. 1976, *cert. denied,* 433 U.S. 914, 97 S.Ct. 2987, 53 L.Ed.2d 1100 (1977), discussed in the text, supra.

The settlement plan "did not even purport" to effect the systemwide desegregation required by the finding of a constitutional violation with a systemwide impact. Brief of the Appellants at 14. Second, the settlement plan is said to place impermissible reliance upon voluntary techniques and private choices as the primary means to achieve desegregation. Finally, the fact that the settlement plan would permit the existence of some all-black schools [23] in the Milwaukee public school system is regarded as a constitutionally fatal defect. We will consider each of these objections in turn to determine whether they reveal the kind of clear unconstitutionality which will render a settlement on its face neither fair, reasonable nor adequate.

[16, 17] The intervenors' first objection need not detain us long. While it is clear that a finding of a systemwide impact requires a systemwide remedy in a fully litigated school desegregation suit, *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 581 (1977), it is not clear that this requirement applies where the remedial portion of a suit is resolved by settlement. We need not address this issue in this case, however, because the settlement plan before us clearly attempts to effect systemwide desegregation. As we read the provisions of the settlement plan, we are hard-pressed to understand the basis for the intervenors' objection. All elementary, junior and senior high schools in the system, with minor exception, are required to achieve certain minimum level of black enrollment; all students in the system have the right to attend a desegregated school upon request; the racial balance transfer program applies throughout the entire system as does the human relations program; and the agreement's two injunctive provisions are clearly

23. The briefs refer to "one-race" schools. As noted earlier in this opinion, however, the settlement plan precludes the existence of any all-white schools in the Milwaukee school system; the only one-race schools which can exist must therefore be all black.

systemwide in operation. The intervenors apparently feel that these measures do not go far enough; however, the probable effectiveness of the measures proposed is an issue completely separate from whether these measures operate on a systemwide level. The plan before us clearly is an effort to effect systemwide desegregation.

[18] The district court believed that the settlement would be effective in achieving substantial systemwide desegregation in Milwaukee and found that the persistence of significant racial segregation after implementation of the plan would indicate that the defendants were in violation of the plan and the Fourteenth Amendment. 471 F.Supp. at 809. In light of the fact that there is no constitutional right to a particular level of racial balance. *Milken v. Bradley,* 418 U.S. 717, 740-41, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069 (1974), we cannot say that the plan is so clearly constitutionally inadequate as to render the settlement invalid on its face.

[19,20] The second objection raised by the intervenors appears plausible on its face. A desegregation plan which relied wholly or primarily upon voluntary techniques to achieve desegregation would be constitutionally inadequate in a fully litigated case in which constitutional violations had been found. However, such is not the plan before us. As we noted earlier in this opinion, while the settlement agreement uses language which suggests that it relies primarily upon voluntary efforts to achieve desegregation, all of the parties to this litigation, other than the intervenors, have understood the agreement to impose an affirmative obligation to desegregate upon the defendants. The district court shared this understanding of the agreement and approved it in light of that understanding. In view of the almost universal acknowledgment of the mandatory effect of the agreement, its slightly ambiguous language does not render it constitutionally infirm.

Finally, the intervenors raise the possible continued existence of

some one-race schools in the Milwaukee public school system as a constitutional defect requiring reversal of the district court. The intervenors apparently would have us follow *Tasby v. Estes*, 572 F.2d 1010 (5th Cir. 1978), *cert. Granted subnom., Estes v. Metropolitan Branches of Dallas NAACP*, 440 U.S. 906, 99 S.Ct. 1212, 59 L.Ed.2d 454 (1979) *cert. dismissed*, __ U.S. __, 100 S.Ct.716, 62 L.Ed.2d 626 (1980).[24] *Tasby*, the Fifth Circuit rejected a court ordered desegregation plan which would have resulted in the existence of a substantial number of on-race schools. The court held that such a plan was acceptable in the absence of specific findings by the district court as to the feasibility of the desegregation technique approved in *Swann v. Charelotte-Mecklenberg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). *Tasby*, 572 F.2d at 1014-15.

[21] We decline to upset the plan before us on the authority of *Tasby* for a number of reasons. First *Tasby* deals with a remedial plan ordered by a district court after full litigation, while the plan before us is the result of a settlement. The Fifth Circuit in *Tasby* instructed the district court as to the proper scope of its inquiry during the remedial portion of school desegregation litigation; it is precisely this portion of the litigation which the parties in the present suit have attempted to avoid through settlement. *Tasby* thus appears inapplicable to the present case.

[22] Second, before a settlement may be rejected because it initiates or authorizes a clearly illegal or unconstitutional practice, prior judicial decisions must have found that practice to be illegal or unconstitutional as a general rule. *Robertson v. National Basketball Ass'n* 556 F2d 682, 686 (2d Cir. 1977). *Grunin v. International House of Pancakes*, 513 F.2d 114, 123-24 (8th Cir.), *cert. denied*, 423 U.S. 864m 96 S.Ct. 124, 46 L.Ed.2d 93 (1975). In *Tasby*, the Fifth Circuit did not hold that a court ordered desegregation plan which permits some one-race school must always be rejected; rather, the court held that, on the facts of that

24. Oral argument in Tasby was held in the Supreme Court on October 29, 1979. On January 21, 1980, a divided court dismissed the writs of certiorari as improvidently granted.

Case, there was not sufficient justification in the record for the substantial number of one-race schools permitted under the lower court's order. 572 F.2d at 1014-15. Under *Tasby,* a district court Must engage in a careful examination of the particular facts of the case and the feasibility of other desegregation techniques to determine whether there is any justification for the existence of one-race schools. *Tasby* announces a case-by case approach to one-race schools rather than a general rule prohibiting them. To have rejected the settlement on this basis, the court below would have been required to rule on legal and factual issues which the parties had chose not to litigate; such an inquiry is clearly inappropriate in a case resolved by settlement. *Robertson,* 556 F.2d at 686; *Grunin,* 513 F.2d at 123-24. Thus, the fact that the plan before us permits one-race schools does not reveal the kind of clear unconstitutionality which would require rejection of the settlement as facially invalid.

[23] Finally, a class action settlement is to be evaluated according to the state of the law as of the time it was presented to the district court for approval. *Dawson v Pastrick,* 600 F.2d 70, 76 (7th Cir. 1979). At the time this settlement was presented to the court below, *Tasby* had been decided by the Fifth Circuit and certiorari had been granted. The state of the law as to one-race schools at that time, as at this, was far from clear, and is unlikely to become clear until the Supreme Court addresses the issue. This settlement should not be evaluated on the basis of unsettled legal principles which will only be clarified at some time in the future.[25]

25. Indeed, a large incentive for settlement in many cases, including this one, is the desire by both parties to avoid the risks created by uncertainty in the legal standards applicable to the litigation. The granting of certiorari in *Tasby* and two other cases. *Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) and *Dayton Board of Education v. Brinkman.* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 666 (1979) seems to have contributed enough uncertainty to plaintiffs' case to induce class counsel to seek settlement. 471 F.Supp. 806,811-12. To

This court cannot, in reviewing approval of a settlement, resolve significant unsettled substantive issues without wholly undercutting the settlement process.

We conclude that, at the time of the district court's approval of the settlement agreement, the desegregation plan contained in it did not initiate or authorize any clearly unconstitutional activities. This Settlement agreement is thus not per se inappropriate. We turn, therefore, to a review of the district court's application of the class action settlement standard to determine whether the court abuse its discretion in finding the settlement fair, reasonable and adequate.

[24] In reaching its decision to approve the settlement agreement, the district court considered each of the factors identified as relevant in Part III, B, supra, and carefully evaluated the probable effectiveness of the settlement agreement in eliminating the effects of defendants' unconstitutional conduct. 471 F.Supp. at 803-13. The court found that each of the relevant factors supported approval and that the settlement addressed itself to the defendants' constitutional violations and provided the plaintiffs with a fair, reasonable and adequate remedy for them. *Id.* 809. As discussed in detail below, our review of the district court's action reveals no abuse of discretion .

allow reevaluation of a settlement on the basis of decisions reached after its approval would undercut this motive for settlement. In addition, since our function is only to determine whether the district court abused its discretion, we must evaluate its actions as of the time of approval and not in light of of post-approval changes in the law. *Dawson v. Pastrick,* 600 F.2d 70, 76 (7th Cir. 1979).

26. *Brinkman v. Gilligan,* 583 F.2d 243 (6th Cir. 1978), *cert. granted sub nom. Dayton Board of Education v. Brinkman* 439 U.S. 1066, 99 S.Ct. 28, 58 L.Ed2d 67 (1979); *Penick v. Columbus Board of Education,* 583 F.2d 787 (6th Cir. 1978), *cert. granted,* 439 U.S. 1066, 99 S.Ct. 24, 58 L.Ed2d 24 (1979); *Tasby v. Estes,* 572 F.2d 1010 (5th Cir. 1978), *cert. granted sub* S.Ct. 1212, 59 l.Ed2d 454 (1979). *The Dayton and Columbus* cases have Since been decided by the Supreme Court; *Tasby* has been dismissed.

As the district court noted, the most important factor to be considered in reviewing a class action settlement is the strength of plaintiffs' case on the merits balanced against the relief offered in the settlement. 471 F.Supp. 804. Closely related to this factor is the complexity, length and expense of further litigation. The district court observed that the granting of certiorari in three school desegregation cases [26] both cast doubt on the strength of plaintiffs' case on the merits and ensured that continued appeals in this litigation would indefinitely delay the imposition of a final desegregation remedy. *Id.* 805-06, 811-12. The district court analyzed the relief offered in the settlement at length and found that, when balanced against the uncertain status of the law as to plaintiff's claims and the probable complexity of any further litigation, it provided relief which was fair, reasonable and adequate. The district court based this conclusion on three aspects of the settlement: (1) although not requiring statistically perfect desegregation, the settlement requires substantial desegregation and permits the parties to achieve greater desegregation if possible; (2) The settlement goes to the heart of the constitutional violations found by the district court by ensuring that no white students can be insulated from attending school with substantial black enrollments;[27] and (3) every student in the system is given the right to attend a desegregated school upon request, thus protecting the rights of individual class members. The district court's analysis indicated to it that the settlement provides the plaintiff class with substantial relief from the unconstitutional acts of the defendants while securing for the litigants the benefits of a prompt resolution

27. The essence of the defendants' past unconstitutional conduct was their "practice of insulating white children from having to attend school with large numbers of black children." 471 F.Supp. at 809 (footnote omitted]. See also *Armstron v. O'Connell,* 451 F. Supp. 817. 866 (D.D.,Wis. 1978). The settlement agreement provides that there can no longer be any Schools in the Milwaukee system "which do not have a significant number of black students." 471 F.Supp. at 809 n. 4. Thus, there will be no public Schools in Milwaukee in which white students can be insulated from black students.

Of the suit without further litigation. We cannot say that the district court abused its discretion in finding that the balance of these factors favored settlement.

The correctness of the conclusion reached by the district court as to the strength of plaintiffs' case on the merits is further supported by the fact that, under the law as it stood at that time, it was not clear that the plaintiffs, in the event of full litigation, would have been entitled to significantly more relief than the settlement provided. The district court observed that the plaintiffs could claim no right to a particular degree of racial balance, 471 F.Supp. at 806, and that to achieve "the most effective remedy for members of the plaintiff class" the court would be required to include school districts outside the Milwaukee system in the operation of the plan, a step the court did not have the power to order. *Id.* at 808 n.2. The court expressed its agreement with the opinion of counsel as to the limitations upon its power to order a remedy:

> The Court also is persuaded that little more could be achieved through Further litigation than is offered in the settlement, and that the Settlement is a realistic compromise in view of the status of the law In general and this litigation in particular, the harm that could result And the harm that could result and the expense and delay that would Result from further litigation, and the presently existing limitations on The court's power to impose an effective remedy.

471 F.Supp. at 812. Thus, it is not at all clear that class counsel sacrificed any established remedial rights of the class in exchange for the benefits conferred by the settlement. At most, counsel negotiated as to whatever rights might be established or clarified by the Supreme Court in the pending school desegregation cases. This conclusion finds support in the brief of the intervening class members filed in this court. While they cite several Supreme Court school desegregation opinions in their attack upon the constitutional adequacy of the settlement, they seem to place special emphasis on *Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct., 2941, 61 L.Ed.2d 666 (1979) and *Dayton Board*

of Education v. Brinkman, 443 U.S./ 526, 99S. Ct. 2971, 61 L.Ed.2d 666 (1979).[28] Brief of the Appellants at 11, 20-23. As discussed above, however, post-approval changes or clarifications in the law cannot provide a basis for challenging a class action settlement. *Dawson v. Pasterick,* 600 F.2d 70, 76 (7th Circ. 1979). The fact that counsel or the district court may not have accurately predicted the outcome of pending cases does not amount to an abuse of discretion.[29]

28. As the intervening class member put it [W]e believe that the District Court and parties were proceeding at a time when the firm requirements imposed by Columbus and Dayton II were not anticipated.

* * * * * *

While Appellants do not know for certain, the timing of the negotiated Settlement suggested to us that the parties who reached agreement were less Prescient than was the District Judge as to the ruling of the Supreme Court in the Dayton II and Columbus cases, and that mistaken notions might have been motive forces. In any event, Appellants are of the view that the language of Columbus and Dayton II makes clear the obligation of a school district such as Milwaukee which, despite the absence of compelling state segregation statutes, was fashioned into a dual system of black and white schools. The duty is to disestablish the dual system.

29. Amici Curiae concede that the settlement cannot be reviewed on the basis of post-approval changes in the law. They maintain, however, that the settlement is constitutionally inadequate under the law as set out in *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct: 2749, 53 L.Ed.2d 745 (1977). They point to three factors identified *Milken* as controlling in this case: (1) a remedy must be related to the constitutional violation; (2) a remedy must, as nearly as possible, restore the victims to the position they otherwise would have occupied; and (3) court must take into account the interest of state and local authorities in managing their own affairs. Brief of Amici Curiae at 10-11, quoting *Milken,* 433 U.S. at 280-81; 81,97 S.Ct. at 2757. The first and third factors are not at issue here so Amici focus on the second factor.

We note initially that the Supreme Court in *Milken* was addressing itself to A fully litigated school desegregation suit, not one resolved by settlement. Beyond this, however, it appears that the district court found, in effect, that The remedy proposed in the settlement agreement did, as nearly as possible, Provide full relief to the plaintiffs. The court expressly observed that

One additional fact is relevant to the strength of plaintiffs' case on the merits and the complexity and expense of further litigation. This litigation was settled at a relatively late stage, after a finding of liability and systemwide impact but before imposition of a remedy. The lateness of the settlement might suggest that there was little doubt as to the strength of plaintiffs' case and little reason to fear further complex litigation. While this may be a rational inference in the usual case, it is not so in a school desegregation class action. The remedial portion of a school desegregation case is unlike that of any other variety of litigation and conceivably can surpass the liability portion in terms of complexity and duration. As the second circuit noted in a recent school desegregation case.

> Establishment of liability is but the first step. The precise remedy does Not follow logically from the determination of liability, but rather Reflects a careful reconciliation of the interests of the many affected Members of the community and a choice among a wide range of Possibilities. "The nature of the litigation does not lend itself to Complete success by one side or the other." *Keyes v. School District No. 1, supra,* 439 F.Supp. (398) at 400.

Continuation of footnote 29.

> Further litigation could achieve little more relief for the plaintiffs and That, to achieve maximum desegregation, the court would be required to Order a remedy which it did not, in the present posture of the litigation, Have the power to order. Keeping in mind that in considering a settlement Proposal the district court is to evaluate the parties claims but not to decide Them. *Patterson v. Stovall,* 528 F.2d 108, 114 (7th Cir. 1978); we cannot That the lower court abused its discretion in reaching this conclusion as to The degree of relief to which plaintiff would have been entitled in the event Of full litigation, or in concluding that the settlement may have provided Virtually the full extent of such relief. Therefore, even if the *Milliken* Standard were applicable to a remedy reached through settlement rather Than litigation, we believe that the district court made the required findings And that its findings, while not free from doubt, do not constitute a clear Abuse of discretion.

U. S. & South End Education Committee v. Board of Education of Waterbury, 605 F.2d 573 at 576-77 (2d Cir. 1979). Thus, when a school desegregation suit is settled prior to the remedial portion, a potentially complex and time-consuming segment of the litigation may be avoided. Class counsel did not bargain away a clear right to particular remedial action in exchange for virtually noting, as the intervenors seem to suggest. Through settlement, counsel avoided the remedial portion of the litigation and possible appeals from the district court's earlier rulings while securing significant relief for the class free from the uncertainty and delay which would have resulted from further litigation.[30] It is difficult to imagine a more appropriate basis for agreeing to a settlement, even a settlement reached at such a late stage of the litigation. The district court considered this and was convinced that it was not being presented with a one-sided bargain, 471 F.Supp. at 806, 811-12; we are similarly persuaded.

30. The complexity and delay possible during this portion of school desegregation litigation is well-illustrated by *Tasby v. Estes*, 572 F.2d 1010 (5th Cir. 1978), which reversed a district court's remedial order and remanded it with instructions to formulate a new student assignment plan, to justify with specific findings the maintenance one-race schools, and to include in the order a particular remedy not included before. 572 F.2d at 1018. The desegregation plan on review in *Tasby* had been ordered by the district court in 1976, 412 F. Supp. 1192 (N.D.Texd.1976), pursuant to a Fifth Circuit opinion reversing and remanding a court ordered plan developed in 1971. 517 F.2d 92 (5th Cir. 1975). The *Tasby* desegregation plan was brought to the Supreme Court, was argued October 29, 1979, and was dismissed on January 21, 1980. *Estes v. Metropolitan Branches of Dallas NAACP*, --- U.S. ----, 100 S.Ct. 716, 62 L.Ed2d 626 (1980). At oral argument in the present case, class counsel characterized the remedial portion of school desegregation litigation as often being "speculative" and indicated that concern with the ultimate outcome of *Tasby* led, at least in part, to the settlement efforts in this case.

[25] In addition to evaluating the merits of plaintiffs' case and the probable course of any further litigation, the district court placed great weight on the opinion of counsel for the plaintiffs and defendants. 471 F.Supp. at 811-12. While the court, of course, should not abdicate its responsibility to review a class action settlement merely because counsel support it; the court is entitled to rely heavily on the opinion of competent counsel. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215 (5th Cir. 1978), *cert. denied*, 439 U.S. 115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976). The district court expressly noted that it had a high opinion of all counsel involved in the litigation, that they favored the settlement, and that their assessment of the strength of plaintiffs' case and the benefits offered by the settlement was in accord with the court's own views. 471 F.Supp. at 811-12. Counsel for the plaintiff class and counsel for the defendants had been extensively involved in the litigation through virtually all of its history, giving the court ample time to evaluate their competence and the weight to be accorded their opinions. There is no basis for disturbing the district court's that this factor favored approval of the settlement.

Related to the opinion of counsel are two other factors: (1) the stage of the proceedings and amount of discovery completed and (2) the presence of collusion in reaching the settlement. The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able able to evaluate the merits of plaintiffs; claims. As discussed above, settlement of this litigation was reached at a very late stage, after the issues had been clearly identified, liability and impact had been decided, and a massive record had been compiled. The district court found, and we agree, that the litigation had progressed to a point at which counsel and the court were fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation. 471 F.Supp. at 805 & 806. The district court also recognized the possibility of collusion among counsel in reaching a class action settlement. The court considered the history of this hotly contested litigation and affidavits of counsel describing the negotiating process sufficient proof of the absence of collusion.

We note that there is nothing in the record to suggest and other conclusion and that the fees paid to class counsel without more, will not support an inference of collusion in view of the district court's express finding that the amounts paid were less than the court would have awarded had the issue been presented. 471 F.Supp. 811.

[26,27] The final factors considered by the district court were the reaction of the class to the settlement and the amount of opposition to the settlement.[31] All named plaintiffs in this action informed the district court that they favored the settlement. AT the fairness hearing held to consider the views of class members, forty-five persons appeared and others sent written statements to the court, most to express their dissatisfaction with the settlement.[32] As the court described these objections:

> The opinions expressed were for the most part thoughtful and Informative. They represent the opinion of only a small percentage of Class members, [33] however, and most were somewhat misinformed With respect to the present state of the law in school desegregation Cases and in particular to the extent of the power which the court Exercises in the case of a settlement and as to the probable effect of the Settlement agreement.

31. In its initial list of relevant factors, 471 F.Supp. at 804, the district court included the defendants; ability to pay. The district court in fact did not consider this factor, and neither do we, because it is not relevant in this case. *Id.* at 805.

32. The district court observed, however, that some of the class members opposed to the settlement took that position because they felt the settlement achieved too much; rather than too little, desegregation. 471 F.Supp. at 812. At oral argument; counsel for the plaintiff class informed as that 8 to 10 of the 45 class members who appeared at the fairness hearing supported the settlement.

33. We were informed at oral argument that there are presently approximately 92,000 students enrolled in the Milwaukee public school system.

471 F. Supp. at 812. The presence of objecting class member is a relevant factor, although not dispositive even when many class members object. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799,808 (3d Cir. 1974);l *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Similarly, while a district court should be hesitant to infer that the class supports a settlement merely because its members are silent, *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1137 (7th Cir. 1979), *cert. denied*, ---U.S.---, 100S.Ct. 146, 62 L.Ed.2d 95 (1979), where This silence is coupled with other indicia of fairness, it provides further support for approval. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).[34] The district court in this case clearly considered the objections voiced by class members, 471 F.Supp. at 812-13, and found that, in view of the relatively small number of objectors and their misconception of the law and probable effect on this settlement, the settlement should be approved. Such determination was, in view of the record before it, well within the discretion of the district court.

34. As the Second Circuit stated in *Grinnell corp.*:

> Any claim by appellants that the settlement offer is grossly and Unreasonable inadequate is belied by the fact that, from all appearances The vast preponderance of the class members willingly approved the Offer. Only twenty objectors appeared from the group of 14,156 claimants.
>
> * * * * * * *
>
> The favorable reception of the settlement offer at the hands of both Plaintiffs and the individual attorneys who had little or nothing to do with The negotiations of the settlement is strong evidence that the District Court Not only failed to abuse its discretion in approving the settlement but Fulfilled its obligation in exemplary fashion.
>
> 495 F.2d at 462. While this apparent approval on the part of class members should not be given as much weight in this; a civil rights action, as in *Grinnell Corp.*, an antitrust action, it nonetheless weighs , however slightly, In favor of approval.

Having reviewed the district court's consideration of the factors discussed above, we are convinced that, far from abusing its discretion , the court proceeded with commendable care and fairness in approving a reasonable and equitable settlement of this hotly contested, complex lawsuit. The settlement provides for a desegregation plan which promises to achieve substantial desegregation in the Milwaukee public schools system. It guarantees that no student can be compelled to attend a segregated school and that all future decisions concerning the operation of the system are made in a manner which observes the constitutional rights of the plaintiff class. The district court stated that a failure to achieve these goals would indicate that defendants had failed to comply with its order. Such a failure to comply can be detected and dealt with within the settlement's own monitoring and policing framework. The settlement represents a major step in the effort to desegregate in the Milwaukee public schools, and, while its effectiveness will be shown only by the passage of time, on its face it bodes well for the future of public school education and community cooperation in Milwaukee.[35]

Amici admonish this court to follow the lead of the Fifth Circuit and resist the temptation to approve a possibly inadequate settlement merely to conclude a lengthy lawsuit. We share the concern expressed by the Fifth Circuit and acknowledge the wisdom of its statement:

> While we deplore contributing further to the seemingly Methuselean duration of this case,"we would not substitute one hour of efficiency for on moment of justice."

Pettway v. American Cast Iron Pipe Co., 876 F.2d 1157, 1223 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979) [footnote omitted]. In this case, however, we are not presented with a choice between an hour of efficiency and a

35. Class counsel stated at oral argument in this court that the settlement had received substantial support in Milwaukee's black community, and that the district court had been made aware of this support.

moment of justice. Rather, our inquiry convinces us that we are presented with a resolution which secures both efficiency and justice. In the face of such a resolution, to "contribute[e] further to the seemingly Methuselean duration of this case," would be to sacrifice justice and efficiency without any rational basis. This we Decline to do.

(28,29) One final issue require our attention. The intervening embers argue that the district court erred in denying their motion to intervene in the proceedings below. The district court based its denial on the fact that a notice of appeal had simultaneously been filed in this court, thus depriving the district court of jurisdiction to grant the motion. It is settled in this circuit that the filing of a notice of appeal terminates the jurisdiction of the district court. *Elgin Manufacturing Corporation v. Vent-Fabrics Inc.* 414 F2d 440, 444 (7th Circuit) A district court has no power to vacate a judgment once a notice of appeal has been filed. *Miller v. U.S.*, 114 F2d 267, 269 (7th Cir. 1940), cert. denied, 313 U.S. 591, 61 S.Ct. 1114, 85 L Ed 15435 (1941. Thus, the district court clearly did not err in denying intervening class members' motion to intervene for the purpose of seeking an order vacating the settlement since the court was without power to enter such an order.

The intervening class members moved, in the alternative, for leave to intervene for the purpose of appealing from the district court's approval of the settlement. We need not decide whether the denial of this motion was proper, in view of the fact that the interveners have been allowed to appeal and no one has contested their right to do. See Joint Brief for Plaintiffs-Appellees and Defendants' Appelles at 26. Furthermore, their right to appeal exists independent of any motion made in the district court. *In Research Corp. v. Asgrow Seed Co.*, 425 F2d 1059, 1060 (7th Cir. 1970), this court held that an unnamed class member who appears in response to a Rule 23(e) notice and objects to a settlement has a right to appeal from an adverse judgment. *Accord, Pettway v.*

American Cast Iron Pipe Co., 576 F2d 1157, 1180 (5th Cir. 1978) cert. denied, 439 U.S. 1115, 99 St. Ct. 1020, 59 Led 2d 74 (1979). The disposition of their motion by the district courtis therefore irrelevant on this appeal, since it is undisputed that Jeffrey, Christopher and Julie Jackson, through their mother Carolyn appeared at the fairness hearing and opposed the settlement. The Jacksons were entitled to appeal as of right and have been accorded that right. We can find no reversible error in the district court's rulings.

We have considered the arguments raised by the intervening class members on this appeal and find them without merit. Accordingly, the order appealed from is affirmed in all respects.

The following findings of fact was taken from Moore's Federal Practice Rule 24 of the Federal Rule of Civil Procedure Section 24.24[1], page 24-92.

"If an applicant is not technically a party, but is involved in the action sufficiently to have a right to appeal its final disposition, the applicant may not immediately appeal denial of a motion to intervene. Thus, member of a class who were entitled to appeal from the final approval or disapproval of any settlement agreement in an asbestos class action were not entitled immediately to appeal denial of their motion to intervene.

iii SUR PETITION FOR REHEARING EN BANC

Following opinion was taken from; In United States Court of Appeals for the Third Circuit, No. 93-1429, *M. Carlough*

v.Amchem Products Inc. v. Admiral Insurance Company.
December 17, 1993.

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO ROTH and LEWIS, Circuit Judge, and ROSENN, Senior Judge.

This class action, designed to effect a settlement between future asbestos claimants and a group of asbestos defendants, was filed on January 15, 1993. The district court granted conditional certification of the plaintiff class, following which several class members moved to intervene. The court denied both intervention of right under Fed R. Civ. P 24(a) and permissive intervention under Fed R. Civ. P. 24(b). However, the district court did assure the proposed interveners of active participation in the status of objectors to the settlement agreement. The proposed interveners then appealed from the order denying intervention. The class representatives and the defendants, both of whom opposed intervention, assert that the district court's order is interlocutory and cannot be appealed at this time. We agree that the order is interlocutory, because we find that the objecting class members will be able to appeal from any final order entered in the district court. Therefore, we will dismiss the appeal.

I.
BACKGROUND

On July 29, 1991, the Judicial Panel on Multidistrict Litigation transferred all federal asbestos personal-injury cases not yet on trial to the Honorable Charles Weiner, Eastern District of Pennsylvania, for coordinated or consolidated pretrial proceedings. *In re Asbestos Products Liab. Litig.* No VI, 771 F.Supp. 415 (J.P.M.L.1991). Judge Weiner first attempted to achieve a "global" settlement, but this proved impossible. However, his

encouragement of negotiations did lead to many settlements of large groups of cases.

Pursuing an apparent common interest in such a settlement, two leading plaintiffs' firms, Greitzer and Locks (the Locks firm) and Ness, Motley, Loadholt, Richardson & Poole (the Motley firm) began negotiations with the Center for Claims Resolution, a consortium of 20 asbestos defendants (the CCR defendants).[1] By early 1993, the Locks and Motley firms and the CCR defendants had reached agreement on a potential settlement for all claims that might be asserted against the ccr defendants in the future. Thus, on January 15, 1993, the Locks and Motley firms and the CCR defendants had reached agreement on a potential settlement for all claims that might be asserted against the CCR defendants in the future. Thus, on January 15, 1993, the Locks and Motley firms filed a class-action complaint, the CCR defendants filed their answer, and the parties filed a stipulation of settlement, jointly moved for conditional class certification, and jointly requested appointment of a special master.

The proposed settlement involves a class defined, in part, as all persons exposed to asbestos products who had not, as of January 15, 1993 filed an action in state or federal court against the CCR defendants. By order dated January 29, 1993, the district court granted conditional certification to the proposed class. The class

1. The CCR defendants are Amchem Products, Inc. A.P Green Industries Inc., Armstrong World Industries, Inc., Certainteed Corporation, CE. Thurston & Sons, Inc., Dana Corporation, Ferodo America, Inc., Flexitallic, Inc., GAF Building Materials Corporation, LU North America, Inc., Maremont Corporation, National Gypsum Company, National Services Industries, Inc., Norsroc Corporation, Pfizer, Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T & N, plc. Union Carbide Chemical and Plastics Corporation, and Unites States Gypsum Company

was certified pursuant to Fed.R.Civ.P. 23(b)(3), permitting members the right to "opt out" and pursue their claims individually if they so desired. The court appointed members of the Locks and Motley firms as class counsel and noted that, if necessary, it might appoint additionalclass counsel in the future. The court also appointed a special master to assist in discovery and other pre-hearing matters, and designated the Honorable Lowell Reed, Eastern District of Pennsylvania, to conduct hearing on the fairness of the settlement. On May 13, 1993, Judge Reed issued an extensive scheduling order governing possible discovery into matters related to the class settlement, the notice to be provided to absent class members, and the court's preliminary revaluation of the fairness of the settlement. Those proceedings have gone forward during the pendency of this appeal.

On February 9, 1993, Shelva D. Wiese and several other members of the plaintiff class (the Wiese parties) moved to intervene[2] The district court, assuming that the intervention was unopposed, granted the motion by order entered February 19, 1993. However, when the court later realized that both the named class plaintiffs and the CCR defendants opposed the intervention, it allowed them to file objections thereto, and conducted a hearing on March 31, 1993. On April 15, 1993, the court issued a memorandum opinion vacating its earlier grant of the motion to intervene, but without prejudice to the Wiese parties' rights as objectors to the class settlement. In rejecting intervention, the The district court concentrated on the Wiese parties; failure to demonstrate that their interests would not be represented adequately by the named class plaintiffs. Thus, in the district Court's view, the Wiese parties did not fulfill the requirements for Intervention of right under Rule 24(a). Nonetheless, the district

2. While as a matter of convenience we are calling Wiese and the other members of the plaintiff class who sought to intervene "the Wiese parties," we do not imply that they are "parties" for any purposes beyond those discussed in this opinion.

court explicitly noted that the Wiese parties would enjoy broad rights of participation in the class action: "As objectors to the class representatives' settlement, they would have the right to appear through counsel, participate in the fairness hearing and conduct discovery. Further, as counsel for CCR point out, they would have standing to appeal the court's approval or disapproval of the class action settlement." (App. At 252.) The court also found that permissive intervention under Rule 23(b) would be denied at that time, because the Wiese parties; status was more appropriately that of objectors than that of intervenors. On April 30, 1993, the Wiese parties filed a notice of appeal from the district court's order denying their motion to intervene.

II

DISCUSSION

[1] The Wiese parties assert that an outright denial of a motion to intervene is appealable immediately under the collateral order doctrine. However, the CCR defendants and the class representatives argue that the Wiese parties, as objecting class members, will be able to appeal from any final order in this case. Therefore, the appelles conclude, the Wiese parties must wait until such final disposition to appeal any result, including the denial of intervention, that may be adverse to their interests.

[2] There is no doubt that an outsider denied intervention claimed to be of right may take an immediate appeal. *Brotherhood of R.R. Trainmen, Baltimore & Ohio R.R. Co.,* 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). Such a proposed intervenor's future involvement in the lawsuit, whether at the trial or appellate level, is foreclosed entirely by the denial of intervention, and the order of denial thus has the requisite finality for appellate review. *McKayk, v. Heyison,* 614 F.2d 899, 903 (3d Cir.1980) (:a denial of a motion for intervention of right is clearly appealable under the law in this circuit and does not depend on the merits of the motion"); see also *American Lung Ass'n of New Jersey v. Kean,*

871 F.2d 319, 325-27 (3d Cir. 1989) (in bifurcated action, party denied intervention in liability phase could not later appeal determination of liability; rather, its avenue of relief would have been to appeal denial of intervention).

[3] However, anyone who is involved in an action sufficiently to have a right of appeal from its final disposition does not have an immediate right to appeal from a denial or partial denial of intervention. See *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 107 S.Ct., 1177, 94 L.Ed.2d 389 (1987). *Stringfellow* was an environmental cleanup action brought by the United States and California against various former owners and operators of an abandoned hazardous waste site. Concerned Neighbors in Action (CAN), a nonprofit organization of Persons living near the waste site, sought intervention of right or permissive intervention. The district court granted CAN limited permissive intervention and CAN filed an immediate appeal. The Court of Appeals for the Ninth Circuit found that for purposes of appellate review, the partial denial of the intervention was a final order.

However, the Supreme Court reached the opposite result. The Court reasoned that, unlike an outsider completely denied intervention, CAN would be able, by virtue of its status as a permissive intervenor, to seek review from the district court's final judgment. In *Stringfellow,* the ability to appeal from final disposition was clearly the key factor precluding an immediate appeal from the partial denial of the motion to intervene. See also *Alaska v. Federal Energy Regulatory Comm'n,* 980 F.2d 761 (D.C. Cir 1992) (in context of rate making proceedings, order of FERC limiting Alaska's intervention was not an appealable final order because it did not preclude Alaska from seeking review of any final decision of FERC); *Kartell v. Blue Shield of Massachusetts, Inc.,* 687 F.2d 543, 550 (1st Cir. 1982) (order granting limited intervention was not an immediately appealable final order, "[t]he intervenors were allowed to intervene and, as parties to the suit with full appellate rights in this action, can adequately protect their interests on appeal from a final decision"); *Shore v. Pariklalnd Hosiery C., Inc.,* 606 F.2d 354, 357 (2d Cir.1979) (order permitting

restricted intervention not an immediately appealable final order; "[I]t made appellants parties to the litigation, thus giving them the right to appeal from an unsatisfactory final order. On that appeal, this Court may review the district court's refusal to grant all of appellants' requested relief ...").

The Wiese parties argue that *Stringfellow* is distinguishable because the intervenor there had been granted a limited right of intervention by the district court, whereas the Wiese parties' motions to intervene, either of right or permissively, were denied outright. However, that distinction is not material because of the Wiese parties' status as members of the plaintiff class. Even though the Wiese parties have not been permitted to intervene formally, they retain substantial rights of participation in the lawsuit as objecting class members. Indeed, the district court, in its opinion on the denial of intervention, specifically noted that the Wiese parties retained "the right to appear through counsel, participate in the fairness hearing and conduct discovery," as well as standing to appeal the court's approval or disapproval of the class action settlement." In this case, while the denial of intervention means that the Wiese parties cannot become class representatives, they nevertheless have other rights to participate as members of the class.

The Wiese parties further maintain that, even if *Stringfellow* stands for the proposition that parties who can appeal the final disposition of a case may not take an immediate appeal from a denial of intervention, they have no assurance of a right to final appeal, and their situation is thus different from that of the *Stringfellow* intervenors. The Wiese parties posit their inability to bring an ultimate appeal on decisions from other court of appeals. See *Croyden Assocs. V. Alleco, Inc.*, 969 F.2d 675 (8th Cir.1992) (class member who was not a named plaintiff could not appeal from approval of settlement agreement, where it had not attempted to intervene); *Walker v. City of Merquite,* 858 F.2d 1071 (5th Cir. 1988) (class members who were not named plaintiffs could not appeal consent decree in fair-housing case); *Guthrie v. Evans,* 815 F.2d 626 (11th Cir.1987) (class member who was not named

plaintiff did not have standing to appeal final judgment).

However, the contention fails because, even if the holdings in Croyden, Walker, and Gughrie would preclude final appeals by class members such as the Wiese parties, they are directly contrary to our own holding in *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971). *Ace Heating* involved consolidated plumbing-fixture anti-trust cases in which aggrieved class members who were not named plaintiffs sought to appeal from the district court's approval of a settlement. Considering the question of whether all class members potentially have a right to appeal a class settlement, in *Ace Heating* we noted: "Ordinarily, aggrieved class members may appeal any final order of a district court in proceedings held pursuant to Rule 23. This general proposition holds true even though such class members have the right to exclude themselves from the class." *Id.* at 32. Thus we found that the aggrieved class members could appeal from the district court's final approval of the settlement. The class members' right to appeal was preserved even though they had known the principal terms of the settlement before the opt-out deadline, and nonetheless had failed to opt out. The Court of Appeals for the Seventh Circuit likewise has indicated that class members have a general right to appeal from a final judgment. *B ash v. Firstmark Standard Life Ins. Co.*, 861 f2D 159 (7TH Cir.1988) (two objecting class members permitted to appeal from approval of settlement.[3] See also *Eng v. Coughlin*, 865 F.2d 521 (2d Cir.1989) (parties granted limited intervention for discovery purposes had not right to immediate appeal of order partially denying intervention.

3. But see *In re VMS Limited Partnership Securities Litig.*, 976 F2d 362 (7th Cir 1992) (Class member could not appeal a postjudgment order). There was a petition for rehearing in *Bash* in which the petitioner for the first time brought to the court's attention other cases, including *Guthrie*, and *Walker*, which suggested that the appellants in *Bash* should not have been recognized as having the right to appeal. The court denied the petition without discussion of the merits of the principle advanced, as it had affirmed the district court and thus the right-to-appeal issue had "no practical consequenc consequences 861 F.2d at 164.

because limited intervenors would have right to appeal after final Judgment).

Moreover, when the facts of the *Croyden, Walker,* and *Guthrie* cases are examined in detail, those cases do not necessarily support the Wiese parties' contention that class members would not b e able to appeal in the present case. In *Croyden,* a securities class action, the court held that class members who had not attempted to intervene in the district court could not appeal the final approval of the settlement. Thus *Croyden* does not apply to class members who, like the Weise parties, have moved to intervene during the proceedings in district court and have been recognized by the district court as having rather broad right to participate in the case.

Guthrie also is distinguishable from the present case for two reasons. First, there is no indication in Guthrie that the class member who attempted to appeal participated or attempted to p-articipate in the proceedings in the district court. Second, *Guthrie* Involved an appeal in a case litigated to judgment rather than an appeal from an order approving a settlement agreement. We think that a nonparticipating class member in a litigated action clearly would be in a less favorable position with respect to arguing that he has standing to appeal than such a class member in a settled action. Fed.R.Civ.P.23(e) requires notice to class members of proposed dismissals or compromises to class actions but says nothing of litigated matters. This distinction suggests that a class member who is not a named party would be recognized as having greater rights to participate in a settled case than in a litigated case.

Just as *Croyden* and *Guthrie* are distinguishable, so too is the third case on which the Wiese parties rely, *Walker v. City of Marquette.* The Walker court reached its conclusion that class members could not appeal from a consent decree by following *Guthrie.* Further, while the *Walker* appellants had attempted to intervene for purposes of appeal, they, like to *Croyden* appellant, had not moved to intervene in district court prior to the entry of the

final judgment, and thus they did not participate in the proceedings in the district court. Therefore, some of the same factors that distinguish *Guthrie* and *Croyden* from the situation of the Wiese parties also distinguish *Walker*.

Altogether, we consider our prior decision in *Ace Heating* to be controlling here. Insofar as the holdings of other courts of appeals in *Croyden, Guthrie,* and *Walker* may contravene the rule of *Ace Heating,* those holdings do not persuade us that there is any basis for questioning *Ace Heating* which is, in any even, binding on this panel. In fact, we recently relied upon *Ace Heating* in permitting objecting shareholders to appeal from the approval of a settlement in a derivative suit. *Bell Atlantic Corp. v. Bolger* 2 F.3d 1304 (3d Cir.1993). Our adherence to *Ace Heating* despite contrary rulings by other courts of appeals, including the rulings of *Croyden, Guthrie* and *Walker*, all of which we cited in *Bell Atlantic,* is particularly appropriate in the context of a nationwide consolidation of mass tort litigation. See *In re Asbestos Products Liab . Litig.* No. VI, 771 F.Supp. 415, 421-22 n.7 (J.P.M.L.1991) (one objective of consolidation of asbestos personal-injury actions is "to minimize the potential for inconsistent decision from courts of appeals").

III

CONCLUSION

The rule of *Ace Heating & Plumbing Co., Inc. v. Crane Co.,* 453 F.2d 30, establishes that the Wiese parties will be able to appeal from the district court's final approval or disapproval of any settlement of this class action. The Wiese parties" right of final appeal in turn brings their situation within the rule of *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 107 S.Ct. 1177, that parties who will be able to appeal from a final judgment will not be permitted to take an immediate appeal from a denial of intervention. Therefore, the denial of intervention to the Wiese

parties is not appealable under the collateral order doctrine, and we will dismiss the appeal.

The following is taken from the Federal Rules of Decision on *Vollmer v. Publishers Clearing House*, 194 F. R. D 637 (S. D.Ill. 1999). This is referenced in paragraph 1(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

Thomas G. VOLLMER, Peggy R. Pospeshil,
Mary Kennah, Phillip Ingram, Albert E. Dix, Steve Mallia, Michell Collins, Barbara Buchanan, H. Duane Kundert, and Dr. Robert Rosenthal, Individually and On Behalf of All Others Similarly Situated, Plaintiffs,

v.

PUBLISHERS CLEARING HOUSE
And Campus Subscriptions,
Inc., Defendants.

CIV. No. 99-434-GPM

United States District Court,
S.D. Illinois

Oct 6. 1999.

On various motions by proposed interveners in class action, the District Court, Murphy, J., held that: (1) intervention of right was not appropriate where proposed interveners' interests were adequately represented by existing parties; (2) permissive intervention was not appropriate where intervention would unduly delay and prejudice the adjudication of the rights of the original parties; and (3) Rule 11 sanctions were appropriate, where

proposed interveners in class action were put forward by counsel for the purpose of interfering with and delaying the administration of justice.

So ordered

1. Federal Civil Procedure 314.1

In order to have a right to intervene, a potential intervener must (1) make a timely application, (2) have an interest relating to the subject matter of the action, (3) be at risk that his or her interest will be impaired, and (4) lack adequate representation by the existing parties. Fed. Rules Civ. Proc. 24(a), 28 U.S.C. A.

2. Federal Civil Procedure 316

Intervention of right was not appropriate where proposed interveners' interests were adequately represented by existing parties in class action. Fed Rules Civ. Proc. Rule 24(a) 28 U.S.C.

3. Federal Civil Procedure 331

Permissive intervention in class action was not appropriate where intervention would unduly delay and prejudice the adjudication of the rights of the original parties, Fed Rules Civ. Proc Rule 24(b) 28 U.S.C.A.

4. Federal Civil Procedure 1269.1

Proposed interveners in class action were not entitled to discovery in order to conclude whether to opt out, participate in, or object to a proposed settlement.

5. Federal Civil Procedure 2771(15)

Rule 11 sanctions were appropriate, where proposed

interveners in class action were put forward by counsel for the purpose of interfering with and delaying the administration of justice, and pleadings were filed on behalf on the proposed interveners for the purpose of causing delay and neediess increase in the cost of the litigation. Fed. Rules Civ Proc. Rule 11(c) (1)(B), 28 U.S.C.A.

Barry R. Himmelstein, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, Ca.

Lynde Selden, II, Selden Law Firm, San Diego, Ca.

MEMORANDUM AND ORDER

MURPHY, District Judge.

I. BACKGROUND.

This matter came before the Court on various pleadings filed by attorneys for Frederick J. Hawk, Michael Hoy, and Timothy Watkins. Hawk, Hoy, and Timothy Watkins. Hawk, Hoy, and Watkins seek to intervene in this class action pursuant to Federal Rule of Civil Procedure 24. The Court held a hearing on October 4, 1999, at which time each of the proposed intervenors testified. On October 5, 1999, counsel for the proposed intervenors, the class, and the defendants presented arguments to the Court on the issue of intervention, and proposed findings of fact and conclusions of law were submitted as had been previously ordered.

II. FINDINGS OF FACT.

In light of the testimony received, the exhibits offered, and the documents reviewed by the Court, the Court makes the following findings of fact:

1. The proposed intervenors are members of the class which has been . . . . . in this action.

2. None of the proposed intervenors has made a decision whether to opt out of the class or to remain in the class and object to the proposed settlement.

3. The proposed intervenors have failed to show that the class representatives in this action are inadequate.

4. The proposed intervenors have failed to show that class counsel has inadequately represented the class in this action.

5. The proposed intervenors have failed to persuade the Court that they have any legitimate objection to the proposed settlement between the class and the defendants.

6. The proposed intervenors were put forward by counsel for the purpose of interfering with and delaying the administration of justice.

7. The proposed intervenors. . . . . between the class and the defendants was in any way collusive.

8. The proposed intervenors have received more than adequate information to decide whether to opt out of the class or to remain in the class and file objection to the proposed settlement.

9. Counsel for the proposed intervenors did not appropriately investigate their clients claims . . . . . with this court specifically; the Court finds that the pleadings filed on behalf of the proposed intervenors were filed for the unnecessary purpose of causing delay and needless increase in the cost of this litigation.

III. CONCLUSIONS OF LAW.

In light of the foregoing, the Court makes the following conclusions of law:

[1,2] 1. In order to have a right to intervene, a potential intervenor must (1) make a timely application, (2) have an interest relating to the subject matter of the action, (3) be at risk that his or her interest will be impaired, and (4) lack adequate representation by the existing parties. See Nissei Sangyo America, Ltd. V. United States, 31 F3d 435, 438 (7th Cir. 1994). The Court finds that intervention of right of right is not appropriate pursuant to Federal Rule of Civil Procedure 24(a) because the proposed intervenors interest are adequately represented by existing parties.

[3] 2. Permissive intervention is not appropriate pursuant to Federal Rule of Civil Procedure 24(b) because intervention will unduly delay and prejudice the adjudication of the rights of the original parties, FED R. CIV. P. 24(b).

[4] 3. The proposed intervenors are not entitled to discovery in order to conclude whether to opt out, participate in and/or object to the proposed settlement, *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co., of Chicago*, 834 F2d 677, 684 (7th Cir 1987). While the conduct of negotiations is relevant to the fairness of the settlement, *In re General Motors Corp Engine Interchange Litigation,* 594 F2d 11061123-1123 (7th Cir.1979), the proposed intervenors are not entitled to discovery at this stage.

[5] 4. Although counsel for the class requested the imposition of sanctions pursuant to 28 U.S.C. section 1927, the court finds that sanctions are more appropriate pursuant to Federal Rule of Civil Procedure 11. Counsel's request for sanctions fails to meet the procedural requirements of Federal Rule of Civil Procedure 11(c) (1)(A) because the request for sanctions was not made in a separate motion, and counsel did not allow counsel for the proposed intervenors 21 days to withdraw their pleadings. In light of the timing of when the pleadings were filed by the proposed

intervenors, however, the Court finds that compliance with Rule 11(c)(1)(A) was impossible. Nonetheless, having heard the testimony of the witness and having reviewed the exhibits and pleadings, the Court finds that sanctions pursuant to Federal Rule of Civil Procedure 11(c)(1)(b) are appropriate because of the factual findings set forth above. Accordingly, the proposed intervenors and their counsel must show cause why they have not violated Federal Rule of Civil Procedure 11(b).

IV. CONCLUSION.

Accordingly, **IT IS HEREBY ORDERED** THAT Proposed Intervenor Hawk's petition to intervene for limited purpose of viewing document depository (Doc.44) **DENIED**; the joinder to petition to intervene for limited purpose of viewing document depository filed by Hoy and Watkins is **DENIED**; Proposed Intervenor Hawk's notice of motion and motion for order permitting intervention of Frederick L. Hawk is **DENIED;** Proposed Intervenor Hawk's motion to intervene is **DENIED**; Proposed Intervenor Hawk's expedited motion to permit objector Frederick L. Hawk to submit document requests and interrogatories to class counsel is **DENIED**; Proposed Intervenor Hawk's expedited motion to continue opt out date, date to file claim form, and fairness hearing date is **DENIED**; and the complaint in intervention is **STRICKEN.** These rulings are made without prejudice to the proposed intervenors raising objections to the proposed settlement in accordance with the notice to the class. Finally, a **SHOW CAUSE HEARING** is scheduled to begin at 8 a. m. on Friday, October 15, 1999. Hawk, Hoy, Watkins, and their counsel are **ORDERED** to appear at that time and **SHOW CAUSE** why they have not violated Federal Rule of Civil Procedure 11(b).

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THOMAS G. VOLLMER, PEGGY R POSPESHIL, MARY KENNAH, PHILLIP INGRAM, ALBERT F. DIX, STEVE MALLIA, MICHELLE COLLINS, BARBARA BUCHANAN, H. DUANE SOUTHER KUNDERT, and DR. ROBERT EAST ROSENTHAL., Individually and On Behalf Of All Others Similarly Situated,

Plaintiffs,

Vs.

PUBLISHERS CLEARING HOUSE and CAMPUS SUBSCRIPTIONS, INC.,

Defendants.

F I L E D.
MAY 24,2001
G.PATRICK MURPHY DIST JUDGE
DIST OF ILL
ST. LOUIS, ILL

CIVIL NO. 99-434 GPM

ORDER

MURPHY, Chief District Judge:

This matter came before the Court for hearing at 7:30 a.m. today. For the reasons set forth on the record at hearing, theCourt finds that Frederick Hawk has effectively waived his appellate rights thereby making the judgment in this action final. Accordingly, Plaintiffs' expedited motion to enforce settlement

agreement and final approval order (Doc. 251) is **GRANTED.** As stated on the record at the hearing, **IT IS HEREBY ORDERED** that Defendants shall either:

1. Present the Court by 4 P.m. today with a surety bond for $22.5 million which will survive any bankruptcy proceeding;

or

2. Transfer the $ 22.5 million currently held in an account at West Pointe Bank & Trust Company in Belleville, Illinois, via wire into a trust account designated by Class Counsel, who will act as trustees, by no later than 10 a.m. tomorrow, Friday, May 25, 2001. This account shall be maintained fro the exclusive benefit of the class. Upon this transfer, Class Counsel shall lift the citation to discover assets previously filed in the St. Clair County Circuit Court.

If Defendants present the Court with an acceptable bond, Defendants will retain responsibility for making the settlement disbursements to the class. In the event that the funds are instead transferred to Class Counsel, Class Counsel shall be responsible for disbursing the funds to the class, and payments shall begin immediately upon receipt of the wire transfer. Payments to the class shall be made without regard to reversion. The Court expressly reserves ruling on the issue of reversion.

If Defendants fail to comply with either option in the forgoing order, this Court will promptly hold a hearing on an order to show cause.

Finally, the aforementioned funds at West Pointe Bank & Trust Company shall not be transferred or disbursed in any manner inconsistent with this Order.

IT IS SO ORDERED.
DATED this 24th day of May, 2001.

"S/_____".
G. PATRICK MURPHY
Chief United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

MINUTES OF COURT

PRESIDER: HON. G. PATRICK MURPHY, US DISTRICT JUDGE

FILED
GPATRICK
MURPHY
DIST. JUDGE
SOU DIST
E.ST

DATE: MAY 24, 2001
TIME: 7:35AM – 8:20AM
OFIL
LOUIS,IL
COURT ROOM DEPUTY: Linda M. Cook
COURT REPORTER: Molly Clayton

THOMAS G. VOLLMER, et al.,

Plaintiff,

Vs:

Case No 99-434-GPM

PUBLISHERS CLEARING HOUSE,
Et al.,

Defendant,

Counsel for Plaintiff(s): Steve Katz, Doug Sprong

Counsel for Defendant(s): Rebecca Jackson

PROCEEDING: MOTION TO ENFORCE SETTLEMENT

Counsel for the parties appears. Arguments heard on the motion to enforce settlement (Doc. 251) filed by plaintiff's, and the court **GRANTS** the motion. The court **FINDS** that the waiver filed on behalf of Frederick Hawk is effective. Defendant may provide a surety by 4:00 PM today for $22.5 million. If defendant chooses not to provide a surety bond, the court **ORDERS** that the money being held at West Pointe Bank & Trust in Belleville, Illinois, be transferred immediately in trust to the law firm Carr, Korein, et at, with Steve Katz and Doug Spong acting as trustees for the exclusive benefit of the class for paying the claims. Class Counsel shall immediately start paying claims. The trust account shall be established by 10:00 AM on May 25, 2001. The money shall not otherwise be transferred. Plaintiff shall then lift the citation to discover assets currently on file in St. Clair County Circuit Court, Belleville, IL. Written Order to follow.

[Doc. # 255]

IN THE UNITED STATES DISTRICT COURT

FILED

FOR THE SOUTHERN DISTRICT OF ILLINOIS

JUL30

2001

MEMORANDUM AND ORDER G.PATRICK MURPHY

MURPHY, Chief District Judge DISTRICT JUDGE

CIVIL NO. 99-434-GPM SOUTHERN DIST OF IL EAST ST. LOUIS ILLINOIS

This matter is before the Court on a letter from proposed Intervener Francis Palumbo, dated July 15, 2001, and received by the Court on July 19, 2001. Mr. Palumbo states in the letter that, in his opinion the motion to intervene as plaintiff in this action is not "finalized."

Mr. Palumbo states that he is prepared to give testimony or rest on his affidavit and testimony. Mr. Palumbo also cites various Connecticut state court cases dealing with intervention.

A review of the file and docket sheet indicates that on December 20, 1999, at 3:30 p.m. this court held a hearing on the motion to intervene filed by Mr. Palumbo. Notice for this hearing was provided via Memorandum and Order filed December 8, 1999 (Doc. 145). In that Order. Mr. Palumbo was ordered to be present in order to testify under oath concerning his motion (ld.) unfortunately Mr. Palumbo did not attend the December 20, 1999 hearing (See Doc. 157). Nonetheless, this Court considered his motion to intervene, and it was **DENIED**.

Accordingly, the motion to intervene is in fact "finalized." It was denied over a year ago. Therefore, Francis Palumbo's request for this Court to rule on his motion to intervene is **DENIED AS MOOT.**

IT IS SO ORDERED

Dated this 30th day of July, 2001

"S/_____".
G. PATRICK MURPHY
Chief United States District Judge

[Doc. # 266]

IN THE UNITED STATES DISTRICT COURT
FILED
FOR THE SOUTHERN DISTRICT OF ILLINOIS **AUG 30 2001**

MEMORANDUM AND ORDER G.PATRICK MURPHY

MURPHY, Chief District Judge DISTRICT JUDGE
CIVIL NO. 99-434-GPM SOUTHERN DIST OF IL

EAST ST. LOUIS, ILLINOIS

This matter is before the Court on a motion for reconsideration filed by proposed Intervener Francis Palumbo (Doc. 267). In a Memorandum and Order dated July 30, 2001 (Doc 266), the Court denied Mr. Palumbo's request for this Court to rule on his motion to intervene. Mr. Palumbo now asks the Court to reconsider that ruling.

Mr. Palumbo's motion refers to Federal Rule of Civil Procedure 50(e). The Court presumes that Mr. Palumbo intended to refer to Federal Rule of Civil Procedure 59(e), because Rule 50 does not have a subsection (e), and Rule 59(e) addresses motions to alter or amend judgment. Under Federal Rule of Civil Procedure 59(e), a party must present "newly discovered evidence that was not available at the time of trial" or point to "evidence in the record that clearly establishes a manifest error of law or fact." *In re Price*, 85 F3d 314, 324 (7th Cir. 1996); *see also Navarro v. Fuji Heavy Indus.*,
117F.3d 1027 (7th Cir 1997) and cases cited therein). In this case

Mr. Palumbo has done neither.

Accordingly, the motion for reconsideration filed by proposed Intervener Francis Palumbo (Doc. 267 is **DENIED.**

IT IS SO ORDERED
Dated this 29th day of August, 2001

"S/_____",
G. PATRICK MURPHY
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THOMAS G. VOLLMER, PEGGY R. POSPESHIL, MARY KENNAH, PHILLIP INGRAM, ALBERT F. DIX G.PATRICK MURPHY STEVE MALLIA, MICHELLE COLLINS, BARBARA BUCHANAN H. DUANE KUNDERT, and DR. ROBERT ROSENTHAL, Individually and On Behalf of all Others Similarly Situated.

Plaintiff,

Vs.

PUBLISHERS CLEARING HOUSE And CAMPUS SUBSCRIPTIONS,

Defendant,

F I L E D
JAN 19, 2000
DISTRICT JUDGE
SOUTHERN DIST OF ILL. EAST ST LOUIS IILLINOIS

CIVIL NO.99-434-GPM

MEMORANDUM AND ORDER

MURPHY, District Judge:

This matter is before the Court on various pleadings filed by Objector/Proposed Intervenor Francis D. Palumbo. Mr. Palumbo's involvement in this case is detailed in the Court's December 8, 1999, Memorandum and Order (Doc. 145). In that Memorandum and Order, the Court set for hearing Mr. Palumbo's "Motion to Intervene as Plaintiff" and ordered Mr. Palumbo to appear in person for the hearing on December 200, 1999, at 3:00 p.m. to testify under oath. After Mr. Palumbo failed to appear at the hearing, the Court reviewed Mr. Palumbo's pleadings and proposed complaint in intervention and, for the reasons expressed on the

record, denied the motion to intervene (see Doc. 157).

On December 27, 1999, Mr. Palumbo filed another motion for leave to intervene (Doc. 160), a motion to request multiple hearings (Doc. 161), and an objection to the Court's December 8, 1999, Memorandum and Order (Doc. 162). In his motion for leave to intervene, Mr. Palumbo seeks to amend the complain t to request $100, 000.00 in compensatory damages and $500,000.00 in punitive damages "to redress the deprivation of rights secure him by the laws of the United States Constitution." The Court finds little difference, if any, in the current motion and Mr. Palumbo's previous motion to intervene. Accordingly, for the reasons thoroughly expressed on the record during the December 20, 1999, hearing, Mr. Palumbo's motion for leave to intervene to amend the complaint (Doc. 160 is **DENIED.**

Mr. Palumbo also objects to the Court's December 8, 1999, Memorandum and Order setting for hearing Mr. Palumbo's motion to intervene (Doc. 162). Mr. Palumbo contends that he was given inadequate notice to allow him to appear at the hearing. Despite Mr. Palumbo's failure to appear at the hearing, the Court carefully considered Mr. Palumbo's pleadings and found them to be without merit. Accordingly, the Court will not reconsider its denial of Mr. Palumbo's motion to intervene. Therefore, Mr. Palumbo's objection to the Court's December 8, 1999, Memorandum and Order (Doc. 162 is **OVERRULED.**

Finally, Mr. Palumbo requests that the Court order that multiple hearing be held before approving a proposed class action settlement agreement (Doc. 161). Specifically, Mr. Palumbo requests that a hearing be held on his motion to intervene in the "District Court in New York City" before the final fairness hearing takes place in this Court. As discussed above, the Court has carefully considered the arguments contained in Mr. Palumbo's motion to intervene and finds that a hearing on the motion is unnecessary. Accordingly, Mr. Palumbo's motion for multiple

hearings (Doc. 161 is **DENIED.**

Finally, the Court notes that the Final Fairness Hearing **REMAINS SCHEDULED** for **Tuesday, January 25, 2000, at 9:00 a.m. before District Judge G. Patrick Murphy, United States Courthouse, Southern District of Illinois, 750 Missouri Avenue, East St. Louis, Illinois 62202.**

IT IS SO ORDERED.

DATED: 01/19/00

"S/_____".
G. PATRICK MURPHY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

THOMAS G. VOLLMER, PEGGY R. POSPESHIL, MARRY KENNAH, PHILLIP, INGRAM, ALBERT F. DIX, G.PATRICK MURPHY STEVE MALLIA, MICHELLEL COLLINS, BARBARA BUCHANAN, OF H. DUANE KUNDART, AND DR. ROBERT ROSENTHAL, Individually And On Behalf of all Others Similarly Situated,

Plaintiff,

V.

PUBLISHERS CLEARING HOUSE And CAMPUS SUBSCRIPTIONS INC.,

Defendants,

FILED
DEC 08 1999
DISTRICT JUDGE
SOUTHERN DIST.
IL. EAST ST. LOUIS,
ILLINOIS

CIVIL NO.99434GPM

MEMORANDUM AND ORDER

MURPHY, District Judge:

This matter is before the Court on various pleadings filed by Francis D. Palumbo. In accordance with the Court's various Orders regarding the administration of claims and other class communication (See Docs 38, 90, 98, 109, and 130), class counsel received a motion for leave to amend the complaint from Mr. Palumbo on October 7, 1999, in which Mr. Palumbo sought compensatory and punitive damages on behalf of himself, only.

During the November 1, 1999, hearing, the court construed Mr. Palumbo's "motion" as a request to opt-out of the proposed settlement in order to pursue his own claim (Doc. 107). Therefore, Mr. Palumbo's "motion" was resubmitted to class counsel for cataloging pursuant to the Court's administrative Orders. It was brought to the Court's attention during the November 23, 1999, hearing that Mr. Palumbo had not received the November 1, 1999 Minute Order. Consequently, the court directed the clerk the mail a copy of the minutes of the November 1, 1999, hearing to Mr. Palumbo (Doc. 128).

On December 3, 1999, Mr. Palumbo filed with the Court a "Motion to Object to Minutes of Court on Proceeding: Status Conference," a "Motion to Intervene as Plaintiff," and a Motion for Leave to Intervene to Amend Complaint." Apparently, Mr. Palumbo does not to intend to opt-out of the proposed settlement. Rather, he seeks to intervene as plaintiff to protect his interests in this matter.

In the proposed order attached to the "Motion to Object to Minutes of Court on Proceeding: Status Conference," Mr. Palumbo asks the Court to strike the November 1, 1999, Minutes and to "reinstate the name of Francis D. Palumbo, as an applicant, and further as a plaintiff in this proceeding." Mr. Palumbo's motion to strike the Minutes is hereby **DENIED.**

With respect to Mr. Palumbo's "Motion for Leave to Intervene to Amend Complaint," the Court construes the document as a proposed document, it shall not be filed in the Court file unless and until the Court grants the pending motion to intervene. Accordingly, the Clerk of Court is **ORDERED** to mark -out the file stamp on the document and place the document on the left-hand side of the file.

Finally, the Clerk of Court is **ORDERED** to add M r.

Palumbo's name to this action in the capacity as a proposed intervenor and to mail a copy of this Order to him at 4 Beaver Brook Lane, Fairfield, Ct., 06432. No further notice on the motion to intervene will be given.

IT IS SO ORDERED

DATED:12/08/99

"S/_____".
G. PATRICK MURPHY
UNITED STATES DISTRICT JUDGE

JURISDICTIONAL STATEMENT:

The jurisdiction of this United States Supreme Court arises form the Memorandum and Order of the United States District Court [Doc. #266) above on page 24 of the appendix. Denial of the motion for Reconsideration by the United States District Court [Doc. #269], and the Notice of Appeal, appeal date of September 21, 2001. Accordingly, the motion for reco9nsideration filed by the proposed Intervenor Francis Palumbo [Doc #267 is **DENIED. IT IS SO GRANTED** dated this 29th day of August 2001. G. PATRICK MURPHY, Chief United States Judge" Accordingly the motion to intervene is in fact finalized." It was denied over a year ago. Therefore, Francis Palumbo's request for this Court to rule on his motion to intervene is **DENIED** moot." **IT IS SO ORDERED,** DATED THE 30th of July, 2001." G.PATRICK MURPHY, Chief United States District Judge. The federal district court entered a final order, giving the United States Appellate Court Jurisdiction of the appeal pursuant to Title 28 Section 1291 Final Decisions of the District Court. Jurisdiction is Transferred to the Circuit Court. ("[t]he filing of a notice of appeal is an even of jurisdiction (sic) significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal") See *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 36, 38 103 S. Ct. 400 74 L Ed 2d 225 (1982). Court of Appeals is limited by Article III of the Constitution to adjudicating only live cases or controversies, and Court is consequently unable to decide questions that have become moot. See *Brody v. Sprang,* 957 F2d 1108 (3rd Cir 1992). The Federal Statute governing motion to intervene Title 28 U.S.C.S.

The Federal Statute that governs the Courts of Appeals, Title 28 U.S.C.S. Section 1254 Courts of appeals; Certiorari; Certified questions. This Writ of Certiorari is not wholly founded on the Courts of Appeals, they are directed toward title 28 Section 1291. Final decisions of the district court.

Title 28 U.S.C.S. Section 2101 Supreme Court; time for appeal or certiorari; docketing; stay (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for writ of certiorari for period not exceeding sixty days.

Also the jurisdiction lies in the U.S.C.S. Rules of the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

F I L E D
01 SEP 25 AM

10:38

CLERK

US DISTRICT

COURT

SOUTHERN DIST OF

Il

EAST ST. LOUIS OFF.

FRANCIS D. PALUMBO
Intervenor,

v. **NOTICE OF APPEAL**

PUBLISHERS CLEARING HOUSE
And CAMPUS SUBSCRIPTIONS,
Defendant,

1. Pursuant to F.R.A. P. 4(a)(1), the intervenor Francis D. Palumbo, hereby gives Notice and appeals to the United States Court of Appeals for the Seventh Circuit from the following judgment or orders:

MEMORANDUM AND ORDER (DOC'S #266,145, & 167)

This matter cam on for consideration on Courts Notice for Hearing (Doc. #145), December 8, 1999, Memorandum and Order before the Honorable Chief Judge G. Patrick Murphy, United States District Judge.

This matter is before the Court on a letter from proposed Intervenor Francis Palumbo, dated July 15, 2001k, and received by the Court on July 19, 2001. Mr. Palumbo states in the letter that,

in his opinion, his motion to intervene as a plaintiff in this action is not "finalized." Mr. Palumbo states he is prepared to either give testimony or rest on his affidavit and testimony. Mr. Palumbo also cites various Connecticut state court cases dealing with intervention. A review of the file and docket sheet indicates that on December 20, 1999, at 3:30 pm, this Court held a hearing on the Motion to intervene filed by Mr. Palumbo. Notice for this hearing was provided via

Appeal Date September 21, 2001

Memorandum and order filed December 8, 1999 (Doc. 145). In that Order Mr. Palumbo was ordered to be present in order to testify under oath concerning his motion (Id).

Unfortunately Mr. Palumbo did not attend the December 20, 1999, hearing (See Doc. 157). Nonetheless, this Court considered his motion to intervene, and it was **DENIED.**

Accordingly, the motion to intervene is in fact "finalized" It was denied over a year ago. Therefore, Francis Palumbo's request for this Court to rule on his mo9tion to intervene is **DENIED AS MOOT.**

IT IS SO ORDERED

Dated this 30 day of July 2001

"/S_____"
G. PATRICK MURPHY
Chief United States District Judge

MEMORANDUM AND ORDER

By ruling/order dated August 29, 2001, Memorandum and Order denying Motion for Reconsideration (Doc. #267). According, the

motion for reconsideration filed by Proposed Intervenor Francis Palumbo (Doc. #267 is **DENIED. IT IS SO ORDERED.**
Dated 29th day of August 2001.

"/S_____"
G. PATRICK MURPHY
Chief United States District Judge

THE PROPOSED INTERVENOR

BY_____
Francis D. Palumbo
P O Box 320123
357 Commerce Drive
Fairfield, Conn., 06430
203-218-9813

Appeal Date September 21, 2001.

.....

I certify that on September 21, 2001, I mailed a copy of this Entry of Appearance, Statement of Issues, Transcript Information and Preargument Statement to the following:
Steven A. Katz, Esq. Judy I. Cates, Esq. Douglas R. Spronge Esq.
Carr, Korefein, Tillery, Kunim, Montdroy, Cates, & Gloass
#10 Executive Woods Court,
Belleville, Ill. 62226

Jennifer M. Arthur
Rebecca R. Jackson, Bryan Cave
211 North Broadway

One Metropolitan Square
Joseph R. Cry
Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, N. Y. 10178

"/S_____"
Francis D. Palumbo

Supreme Court, U.S.
FILED

02 772 SEP - 4 2002

OFFICE OF THE CLERK

(2)

No.

In The
Supreme Court of the United States

THOMAS G. VOLLMER, PEGGY R. POSPESHIL, MARRY KENNAH, Individually, and On behalf of all others Similarly situated, et at., Plaintiff,

Francis D. Palumbo,

Petitioner,

v.

Publishers Clearing House and
Campus Subscriptions, Incorporated

Respondent,

On Petition for Writ of Certiorari
To The Washington Supreme Court

Supplemental Appendix to
PETITION FOR WRIT OF CERTIORARI
Petitioner

Francis D. Palumbo, Pro Se
P O Box 320123
Fairfield, Connecticut 06430
203 218-9813

5 pp

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(a) ORDER, United States Court of Appeals for The Second Circuit, *Vollmer v. Publishers Clearing House and Campus Subscriptions,* No. 01-3573 (January 25, 2002) ii-iii

(b) ORDER FOR RECONSIDERATION, United States Court of Appeals for the Second Circuit, *Vollmer v. Publishers Clearing House and Campus Subscriptions,* No. 01-3573 (June 10, 2002). iv

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 25, 2002

Before

Hon. Frank H. Easter Brook, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Hana Diamond Rovner. Circuit Judge

THOMAS G. VOLLMER,] Appeal from the United
PEGGY R. POSPESHIL,] States District Court for
MARRY KENNAH,] For the Southern District
Individually, and on of Illinois.
Behalf of all others
Similarly situated, et al
Plaintiff, No. 99 C 434

No. 01-3573 v.

G. Patrick Murphy
Chief Judge.

PUBLISHERS CLEARING
HOUSE and CAMPUS
SUBSCRIPTIONS,
INCORPORATED,
Defendant,

APPEAL, OF:
Francis D. Palumbo,
Intervenor-Appellant,

ORDER

On consideration of appellant's "MEMORANDUM" filed on October 19, 2001, and the "RESPONSE TO COURT'S SHOW CAUSE ORDER CONCERNING JURISDICTION" filed by appellee on November 1, 2002, and review of the short record.

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. In this case the order denying Mr. Palumbo's motion to intervene was entered on December 27, 1999, and the Notice of appeal was filed on September 20, 2001, over 1-1/2 years late. Mr. Palumbo cannot circumvent his failure to appeal the September 1999 denial of his motion to intervene by asking the district court to "finalize" it over a year later. See B. H. by *Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993) (order denying motion to intervene subject o immediate appeal, a proposed intervenor cannot circumvent failure to appeal denial of first motion to intervene within the required time by filing a second, virtually identical, motion).

Francis D. Palumbo
P O Box 320123 Fairfield, Ct
06430 1-3573

Enclosed is a copy of a document issued by this court in the above captioned case. Since this will be the only copy your firm will receive, if applicable, please circulate this order to other members of your firm who may have an interest in this case.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 10, 2002

Before
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Daniel A Manion, Circuit Judge
Hon. Dana Diamond Rovner, Circuit Judge

THOMAS G. VOLLMER,
PEGGY R. POSPESHIL,
MARY KENNAH,
Individually, and on behalf
Of all others similarly
Situated, et al.,
Plaintiff,

v.

PUBLISHERS CLEARING
HOUSE and CAMPUS
SUBSCRIPTIONS,
INCORPORATED,
Defendants-Appellees,

APPEAL OF:
FRANCIS D. PALUMBO,
Intervenor-Appellant

Appeal from the United States District Court for the Southern District of Illinois.

No. 99 C 434

G. Patrick Murphy,
Judge.

ORDER

On consideration of the motion to reconsider, filed by appellant, IT IS ORDERED that motion is DENIED.